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No. 91-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

PLUMBERS AND PIPEFITTERS
LOCAL UNION NO. 520,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
and CATALYTIC, INC.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals err by abandoning the Spielberg Mfg. Co. method of analysis of the propriety of NLRB deferral of jurisdiction over unfair labor practices previously used by it and by other Circuits, and instead adopting a waiver-of-rights analysis that contravenes the express waiver standard set by the Supreme Court in Metropolitan Edison Co. v. NLRB, thereby creating a division among the Circuits?

II. May the NLRB defer its jurisdiction over unfair labor practices to a grievance resolution by an International Union where (1) the resolution was not a "settlement," but merely a decision not to advance the employee's grievance to arbitration, (2) there was no evidence that the employee's statutory rights were addressed, (3) the employee and his local union opposed the resolution, (4) the administrative law judge found that the International Union may have been more interested in advancing its own interests than in protecting the rights of the employee, and (5) the employee received nothing from the resolution.

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CITATIONS TO OPINIONS BELOW

Plumbers and Pipefitters Local Union No. 520 v. National Labor Relations Board and Catalytic, Inc., 755 F.2d 744 (D.C. Cir. 1992)

Catalytic, Inc. and Plumbers and Pipefitters Local Union No. 520, 301 NLRB No. 44 (1991)

BASIS OF SUPREME COURT JURISDICTION

The Court of Appeals entered its judgment in this matter on February 11, 1992, and refused rehearing en banc on April 14, 1992. This is a civil matter reviewable under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The foundation of this case is a charge that Respondent Catalytic violated 29 U.S.C. §158(a)(1) and (3) by abridging employee rights guaranteed by 29 U.S.C. §157:

> §157. Rights of employees.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS §158(a)(3)].

§158. Unfair labor practices.

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer-

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS §157];
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * * *

STATEMENT OF THE CASE

This case arose from a charge filed September 18, 1985, by Plumbers and Pipefitters Local Union No. 520 ("Local 520") and a complaint issued thereon by the General Counsel of the National Labor Relations Board ("NLRB" or "Board") on January 30, 1987, against Catalytic, Inc. ("Catalytic"). The fact situation is unusual because it involves employment under a nation-wide collective bargaining agreement called the General Presidents' Project Maintenance Agreement ("GPPMA") between 14 International Unions in the building trades and some large national and multi-national construction companies. Local 520 is subordinate to the United Association of Plumbers and Pipefitters (the "International"), which is a party to

the GPPMA, but Local 520 is not a party itself.

The Complaint averred violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3), by Catalytic in its discharge of Local 520's steward, Garland Berry, on September 13, 1985. It was heard by Administrative Law Judge Karl H. Buschmann on April 20 and May 1, 1987, in Harrisburg, Pennsylvania. Both Catalytic and Local 520 were present and given full opportunity to present evidence and argument. Catalytic argued that the Board should defer to the resolution of a grievance over Berry's discharge reached by the International through the GPPMA grievance process over the objection of Local 520. It also argued that it had not violated the Act in discharging Berry. The issues considered by Judge Buschmann

were: (1) Whether deferral to the contractual grievance resolution was justified; and (2) Whether the Respondent [Catalytic] had violated Section 8(a)(1) and (3) of the Act by discharging Garland Berry.

Judge Buschmann concluded that deferral was not appropriate considering these factors: the possible sacrifice of the Employee's interest for a "larger goal" of the international union, lack of involvement in and objection to the resolution by the Employee and his local union, and Catalytic's failure to make any concessions. Judge Buschmann then considered the merits of the claim and determined that Catalytic had engaged in unfair labor practices and, as such, the Employee should be reinstated with full back pay.

Catalytic excepted to the administrative law judge's decision. On review, the NLRB reversed Judge Buschmann's determination as to deferral. The Board based its reversal on an analysis of Postal Service, 300 NLRB No. 23 (1990), where it had held that it was authorized to apply deferral principles to:

> "settlement agreements between the employer and the authorized bargaining representative that were reached during contractual grievance and arbitration proceedings short of a final and binding arbitration award, even though the employee grievant opposed the settlement."

The NLRB declined to consider the case on its merits.

The U.S. Court of Appeals for the District of Columbia affirmed the NLRB.

It held that the International had the right to "waive" the steward's statutory rights and that the International had done so, apparently by accepting the grievance resolution. The Court did not adopt, but in fact specifically rejected, the analysis used by the NLRB in deciding to defer. In doing so, it departed from its own precedents as well as the method of analysis applied in all other Circuits.

Jurisdiction of the Court of Appeals arose from 29 U.S.C. §160(f).

FACTS

Although not parties to the GPPMA, local unions affiliated with the 14 international unions that are signatory to the agreement have certain functions to perform under it, including the referral

of tradesmen to the jobs. Local 520 is one of the local unions that supplies employees to work under the GPPMA but is not itself a party. Local 520 is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (the "International"), an international union which is a signatory to the GPPMA.

Catalytic obtained a contract with Philadelphia Electric Co. ("PECO") to perform construction work at PECO's Peach Bottom Power Plant. The aggrieved employee, Garland Berry, was appointed by Local 520 as its steward in April, 1984. Berry had previously been employed by Catalytic at Peach Bottom for about five years. Local 520 and Catalytic had a number of disputes over contract matters, and in some of those disputes PECO became

involved. Berry was involved in these disputes as Local 520's steward.

In August, 1985, Berry became involved in a dispute between Local 520 and Catalytic over the manning of a work crew to remove shock suppressors called "snubbers" for repair. Although Berry cooperated with Catalytic in drawing up a schedule for the new crew, he also relayed messages to and from Local 520's business manager, August Hartinger.

Late on a Friday afternoon in September, 1985, Hartinger called Berry and instructed him to direct the entire snubber crew to report to work at their regular starting time the following week. Berry did as told. He went to the area where the snubber crew was waiting and told them "that at this point in time the Local is not going to go along with the splitting of the shifts, gentlemen, you

report at your next scheduled work day which would have been Tuesday at 7:30 in the morning."

Catalytic heard of Hartinger's order. Over the weekend Catalytic's management contacted the International Representative of the International assigned to Peach Bottom. Before Monday, the controversy was worked out between Catalytic, the International and Local 520, and no problems occurred on the job.

Two weeks later, on September 12, 1985, a meeting to discuss grievances took place at Peach Bottom. Hartinger, Berry, the International Representative and Catalytic officials attended. Catalytic began by announcing its intent to fire Berry for threatening a quality control inspector, and complaining that PECO was having a hard time accepting Berry as steward and that PECO wanted him

dismissed. Berry denied having threatened the inspector, and it was established to the satisfaction of Catalytic that Berry was not the individual who had threatened the inspector.

The next day Catalytic telephoned Hartinger to tell him that Berry was being discharged. The stated reason for discharge was gross insubordination, in particular Berry's delivery of Hartinger's message to the work crew telling them not to report for the split shift that had occurred two weeks earlier. A grievance was filed.

The GPPMA grievance procedure does not provide a significant role for either the local union or for the individual grievant. The local union initiates a grievance by sending a telegram to the president of its international union--in this case the United Association--in

Washington. The International president then notifies his representative for the geographical area in which the matter arose and sends a copy to the employer and to the administrator of a group called the General President's Committee ("GPC") that is created by the GPPMA, and to the International's representative to the GPC. (App. 53)

The International turned the grievance over to Frank Coyne, the President's Representative to the GPC. Hartinger was informed that a meeting of the GPC would be held in Palm Springs, California in January, 1986, but was told neither he nor Berry could attend. The GPC meets periodically to discuss grievances. If the GPC is not able to recommend a resolution that is satisfactory to the international union and the employer involved, the

international or the employer may refer the grievance to arbitration; however, neither the local union nor the individual grievant has such a right. The GPC met on January 15, 1986. No one notified Hartinger or Berry of the meeting's outcome. At the end of January, Hartinger called Coyne and at that point was told the results: Berry was eligible for re-hire, but not for back pay. That simply meant that Berry, like thousands of other Pipefitters, was eligible for hiring. In October, 1985, the Catalytic site manger had told Hartinger that Berry was eligible for rehire, so the GPC recommendation gave Berry nothing. On top of that, Catalytic was not hiring, so eligibility for rehire gained Berry nothing; he was still unemployed. Although Local 520 asked that the grievance be taken to the fourth step of the grievance procedure, binding

arbitration, the International refused. Under the GPPMA, the GPC recommendation became final.

As Berry had received no redress from the grievance procedure, Local 520 continued to pursue its charge with the NLRB.

REASONS FOR GRANTING CERTIORARI

Local 520 asks the Court to grant its petition for certiorari under Rule 17.1(a) and (c) on the grounds (1) that the Court of Appeals decision conflicts with decisions of other Courts of Appeals in its method of analysis and result; and (2) the Court of Appeals decision conflicts with this Court's holding in Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).

I. CONFLICT WITH OTHER CIRCUITS

A. The Court rejected the traditional method of court review of NLRB deferral under Speilberg in favor of a waiver-of-rights analysis that disregards its own precedents and the method used in other Circuits.

Except in the case before the Court, the national standard for review of NLRB deferral has been to determine whether the Board properly applied the "Spielberg/Olin" criteria. The Circuit Court decision in the instant case rejects the Spielberg/Olin criteria as not supported by "a coherent theory" (Slip op. 25) and having "no apparent standards for judgment" (Slip op. 24). The Circuit Court applies a new analysis based on the ground that Berry's rights under §8(a)(3) were "waiveable" and, in fact, waived by the International in this case. The

Circuit Court's analysis is a radical deviation from the standard methods of analysis and resulted in Berry being denied relief under the "repugnant to the Act" criterion of Spielberg/Olin that surely would have resulted in reversal of the NLRB decision.

Spielberg Mfg. Co., 112 NLRB 1080 (1955) began the development of the NLRB's post-arbitration deferral policy that has been accepted generally by the Courts and steadfastly by the Board for over 35 years. The policy was formulated to address a situation in which a grievance alleging a labor contract violation and an unfair labor practice charge alleging a statutory violation, arose out of the same occurrences. Spielberg was to be applied where a labor arbitrator had ruled on the grievance, but the unfair labor practice charge was still pending. Under Spielberg

the Board would decline to address the statutory issue, or "defer to the arbitrator's award," if (1) the arbitration proceedings had been fair and regular, (2) all parties had agreed to be bound by the award, and (3) the arbitration decision is not "repugnant to the Act."

Spielberg is an NLRB attempt to balance two express interests of the National Labor Relations Act: the Board's own unfair labor practice jurisdiction to protect the important statutory rights granted by §8, and the public policy of encouraging private resolution of labor-management disputes. Taylor v. NLRB, 786 F.2d 1516 (11th Cir. 1986). Although Spielberg in principle has received general approval, its application by the Board has repeatedly been challenged by the circuits. But in all cases, the

Circuits analyzed the NLRB deferral using the Spielberg criteria.[1]

In such cases, the Courts of Appeals that review NLRB decisions universally accepted the Spielberg criteria as justifying post-arbitration deferral, but customarily insisted on strict and careful review of the third criterion, "repugnant to the Act," and sometimes required specific evidence to show that the standards were met. Thus, the First Circuit insisted on proof that the unfair labor practice issue had been presented to the arbitrator, Raytheon Co., 140 NLRB 883 (1963), enforcement den. on other grounds, 326 F.2d 471 (1st Cir. 1964). The Third

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[1]Some of these cases are Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974); NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981); NLRB v. Motor Convoy, Inc., 673 F.2d 734 (4th Cir. 1982); Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977).

Circuit, that the arbitrator's opinion must show that be considered the unfair labor practice issue, NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981), and the Ninth Circuit that the statutory issue had been presented to the arbitrator, Stephenson v. NLRB, 550 F.2d 535 (9th Cir. 1977).

The NLRB reformulated the Spielberg standards in Olin Corp., 268 NLRB 573 (1984). The Board said that before deferring, it also would require proof that (1) the contractual and statutory issues are factually parallel, and (2) the arbitrator was presented generally with facts relevant to the unfair labor practice. Although this reformulated standard did not meet with universal acceptance in the Courts of Appeals either, the Circuits continued to analyze deferral using Spielberg or Spielberg/Olin

principles, while rejecting their application to a particular case. For example, the Eleventh circuit held that Spielberg/Olin did not "sufficiently protect the employee's rights" under the NLRA and demanded additional assurances that statutory issues had been addressed in arbitration. It also wisely noted concerns that the Board's analysis unfairly placed on the employee the duty of proving that the arbitration proceeding was irregular. Taylor v. NLRB, supra.

The District of Columbia Circuit's decision in Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986), like most of its precedents, applies a standard Spielberg analysis.[2] It focuses on the third Spielberg deferral criterion, repugnancy to the Act. The Darr Court remanded the

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[2]See, also, Banyard v. NLRB, 550 F.2d 342 (D.C. Cir. 1974).

case to the NLRB for an explanation as to why an arbitration award granting only reinstatement to an employee who exercised her statutory rights was not repugnant, where a similar Board decision would also have awarded the employee back pay.

Darr also questions the theoretical underpinnings of Spielberg/Olin, stating that it is based on an "admixture of theories." It warned that:

> "we have profound doubts that the Board may defer to an arbitrator's award merely because the award is roughly analogous to that which the Board would grant . . . without explicitly articulating its view of the interrelationship between the law of the collective bargaining agreement and the NLRA. * * * * Ultimately, our review will depend on how the Board articulates not only its general theory of deference, [the D.C. Circuit's term for deferral to an arbitrator's award] but how it applies in a particular case."

801 F.2d 1404, 1409.

Despite this clear warning that a specific articulation of the deferral theory and its application to the case is an essential for Court review, the NLRB has never chosen to provide that explanation. That is why the District of Columbia Circuit's decision in the instant case is so puzzling. The Board made no attempt in its decision to articulate its deferral theory, and the Board counsel's attempt to do so at oral argument was described by the Court as "opaque." (Slip op. 25 n. 10)

The instant case came before the District of Columbia Circuit with this background: in general, the Courts of Appeals approve the idea of deferral and the Board's use of Spielberg/Olin standards. However, in individual cases they have insisted on more particular assurances that the issues concerning

statutory rights of employees were presented to the arbitrator and that the grievant received an appropriate remedy through arbitration. In Darr, the District of Columbia Circuit also demanded an explanation of the theoretical justification of deferral.

Also relevant to the Circuit Court's analysis in the instant case was the lack of an arbitrator's award in the instant case. On two prior occasions the Board had extended Spielberg/Olin deferral to arbitration awards to deferral to grievance settlements between the parties. In doing so, the Board had modified the "repugnant to the Act" Spielberg/Olin criterion by using the phrase "palpably wrong." Alpha Beta, 273 NLRB 1546 (1985), aff'd sub nom Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987) and Postal Service, 300 NLRB No. 23 (1990).

The Circuit Court opinion in the instant case construes the "palpably wrong" standard to mean that the Board will intervene

> "when it dislikes a settlement but will stay its hand when the terms of the settlement meet with its approval. The problem is that there is no way to determine what--apart from the whim of the Board--will influence a judgment to approve or disapprove a settlement."

Had the Circuit Court analyzed this case under Spielberg/Olin, as other Courts of Appeals would have done, and as it did in Darr, the Court would have had to have rejected deferral. But here, the District of Columbia Circuit applied its own new and different theories to sustain the Board decision. It rejected the Board's "palpably wrong" analysis and, by implication, the analogous "repugnant to

the Act" inquiry. It made the remarkable and unprecedented finding that no statutory issue exists for the Board to consider, because the International waived Berry's statutory rights. (Slip op. 18-20)

The meaning of the District of Columbia Circuit's finding is clear, broad and frightening: the Court has ruled that an employee victim of an unfair labor practice may have his statutory rights given away, or "waived," by a union acting as his collective bargaining agent, provided that the right involved is a "waiveable" right. Here the right involved was an employee's right under §8(a)(3) to participate in or refrain from participating in union activity. Among those rights that are not waiveable, the Court says, are the rights to free choice of bargaining representative, "hot cargo"

agreements and secondary boycotts, the statutory prohibition of closed shops, and preference to union members in hiring halls. (Slip op. 13 n. 5) That means, therefore, that the District of Columbia Circuit would permit the wholesale waiver of all other rights enshrined in §7 of the Act, 29 U.S.C. §157, with no recourse through the NLRB for protection of those rights. Thus, any individual employee or group of employees whose interests are sacrificed by a union for the "greater good," or even for no good reason, has only the expensive and generally impractical possibility of a duty of fair representation suit against his union available for redress. (Slip op. 18)

Plainly, there is no comparison between an employee's access to the Federal or State Court systems and his access to the NLRB. The statutory

enforcement system created by the NLRA features the following:

(1) initiation of proceeding by a one-page unfair labor practice form that may be filled out by employee and mailed to NLRB. There are no formal pleadings at this stage.

(2) NLRB conducts investigation of charge.

(3) If merit in charge, NLRB General Counsel issues complaint and conducts all pre-trial, trial and post-trial legal proceedings on behalf of employee, at no charge to employee. That includes providing

complete, no-cost legal representation to employee.

(4) To win for employee, NLRB must prove that Employer violated law by a preponderance of the evidence.

The alternative of a duty of fair representation proceeding is vastly different and, on its face, much less accessible to a victimized employee. DFR suits are brought against the employee's union and, usually, employer. (In order to obtain reinstatement to a job, the employer must be a party.) The suit must be brought in State or Federal court, which requires the employee to obtain legal counsel. As in any other litigation, the full rights of pleading and discovery are afforded the parties. And instead of trying the case to an

Administrative Law Judge expert in §8 law, and ultimately decided by the NLRB, the case is tried to a judge or jury lacking the expertise of a specialized administrative agency. Moreover, to win the employee must prove that his underlying complaint or grievance against the employer was good, and that the union acted in bad faith in negotiating the settlement of his grievance. Vaca v. Sipes, 368 U.S. 171 (1967).

The disadvantages to an employee disqualified from access to NLRB procedures is overwhelming. In announcing this forced alternative to judicial review of NLRB, the Circuit Court did not even mention the immense public policy ramifications of its decision.

One can scarcely deny that the effect of the District of Columbia Circuit's "waiver" theory would be to limit Board

access only to non-union employees and to institutional conflicts between unions and employers. Any unionized employee who has asserted a §8 right will be forced to file a grievance under the Board's pre-arbitration "Collyer" deferral policy[3], and be barred from effective review of the arbitrator's award or the settlement of the grievance under the decision in this case as a result.

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[3]The NLRB defers unfair labor practice charges that could be arbitrated under its pre-arbitration deferral policy set out in Collyer Insulated Wire, 192 NLRB 837 (1971) until after the grievance is arbitrated, then reviews the arbitration award under Spielberg/Olin.

B. The Circuit Court's "waiver" holding violates the Supreme Court's decision in Metropolitan Edison.

The essential holding of the District of Columbia Circuit's decision is its finding that the International could and did waive Berry's §7 rights when it accepted the grievance "resolution." The Court erroneously extrapolated its finding that a union may do so from the Supreme Court's decision in Metropolitan Edison Co. v. NLRB.

The most patent divergence from Metropolitan Edison is the District of Columbia Circuit's ignoring of the essential requirement that any union waiver of individual employee rights must be "explicitly stated." 460 U.S. 693, 708. There was no waiver here, either in the collective bargaining agreement or in the grievance resolution. The Circuit

Court could not find that a waiver was made in the labor contract, as that contract is part of the record and contains no waiver. Certainly, the District of Columbia Circuit made no reference to any contractual waiver. Instead, the Circuit Court found a waiver in the after-the-fact grievance resolution, which it termed a "settlement." In other words, the Circuit Court held that the International waived the individual rights of Berry under §7 several months after Berry had exercised them by the act of not advancing the grievance to arbitration.

The Circuit Court's holding flies in the face of Metropolitan Edison's before-the-fact, express waiver requirement. Here, there is no settlement document or other written record. The only evidence in the record about the reasons behind the

International's decision not to arbitrate the grievance is the International Representative's statement that the matter was "out of their hands now because the case had been filed before . . . National Relations Board."[4]

Neither the NLRB nor the Circuit Court expressly addressed the issue of whether a union may waive its members' statutory rights after the right has been exercised, and thereby expose the employee to discipline. Certainly, such a doctrine would subject an employee to the whims of union politics and competing interests mentioned by the Administrative Law Judge

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[4]The Circuit Court panel embarked on a fact-finding analysis (Slip op. 21) to justify ignoring the International Representative's statement. The Circuit Court found waiver implications in the International's handling of the grievance not found by the administrative law judge or the NLRB majority. The Circuit Court's findings amount to utter speculation about the International's motivation and intent.

in this case as a reason for refusing to defer.[5]

The Metropolitan Edison requirement that any waiver of §7 rights be "explicitly stated" in a collective bargaining agreement guarantees that a waiver will be known to the employee before the fact. That would allow the employee to limit his conduct to that which is permitted under the contract, rather than under the law, and avoid jeopardizing his employment.

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[5]"It is plausible to conclude that the interests of the International Union were not wholly congruent with those of Berry (the steward) and Local 520, and that the International attempted to settle a larger controversy, i.e., Catalytic's and PECO's overall dissatisfaction with the pipefitters.

II. **THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO REVIEW THE NLRB'S HOLDING, SUSTAINED ON DIFFERENT GROUNDS BY THE COURT OF APPEALS, THAT IT MAY DEFER ITS JURISDICTION TO A GRIEVANCE RESOLUTION BY THE PARTIES WHERE (1) THE RESOLUTION WAS NOT A "SETTLEMENT," BUT MERELY A DECISION NOT TO ADVANCE THE EMPLOYEE'S GRIEVANCE TO ARBITRATION. (2) THERE WAS NO EVIDENCE THAT THE EMPLOYEE'S STATUTORY RIGHTS WERE ADDRESSED, (3) THE EMPLOYEE AND HIS LOCAL UNION OPPOSED THE RESOLUTION, (4) THE ADMINISTRATIVE LAW JUDGE FOUND THAT THE INTERNATIONAL UNION MAY HAVE BEEN MORE INTERESTED IN ADVANCING ITS OWN INTERESTS THAN IN PROTECTING THE RIGHTS OF THE EMPLOYEE, AND (5) THE EMPLOYEE RECEIVED NOTHING FROM THE RESOLUTION.**

The NLRB's deferral of its jurisdiction in this case goes far beyond anything it has done before. The Board has extrapolated from its Spielberg Mfg. Co., supra, policy of deferring to arbitration awards, to deferring its jurisdiction to a union's mere act of deciding not to arbitrate a grievance. In doing so, it has cast aside the

Spielberg/Olin insistence on an arbitrator's award, which had insured a modicum of protection to the affected employee, and begun accepting nothing in its place. It is impossible to conduct a Spielberg/Olin review where what is being reviewed is not an arbitrator's award, or even a written grievance settlement, but merely inaction.

It is difficult to characterize the manner in which the grievance procedure ended in this case. Under the GPPMA, the third step of the procedure is submission of the grievance to a meeting of the GPC, a panel made up of representatives of the 14 international unions that have signed the GPPMA. The GPC has no final decision making authority, but merely reviews the matter and recommends a resolution. Both the employer and international union that are party to the grievance may ignore the

recommended resolution and take the grievance to arbitration. The GPC does not take testimony, but rather accepts statements from the parties to the grievance. The record in this case contains no evidence of what was presented by the International to the GPC concerning Berry, other than that the International's statement was "brief." Both Berry and Local 520 were specifically denied permission to attend the GPC meeting in February, 1986, in Palm Springs, California, by the International.

The record shows that the GPC recommended that Berry be made "eligible for rehire without back pay." The record also shows that five months before, in October, 1985, Catalytic told Berry that he was eligible for rehire. Therefore, the GPC recommendation granted Berry nothing. The Circuit Court may have

incorrectly read "eligible for rehire" as "reinstatement." The problem was that Catalytic was not, and had not been, hiring and that Berry remained unemployed.

In two other cases the NLRB has deferred to written grievance settlements. In Postal Service, 300 NLRB No. 23 (1990) and Alpha Beta, 273 NLRB 1546 (1985), aff'd sub nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987), the Board had before it negotiated, written settlements. In Alpha Beta, the written settlement had been signed by all grievants who apparently had the specific intent of, thereafter, using the NLRB's unfair labor practice jurisdiction to subvert the settlement. In deferring in those cases, the Board emphasized that the parties had resolved their differences by a negotiated settlement, and that subsequent Board intervention would interfere and upset

that private agreement to which all parties had indicated their agreement.

As pointed out by NLRB dissenting Member Cracraft in the instant case, that is not what happened before the GPC:

> "resolution of the Berry grievance was not the result of negotiations or discussions between the parties. What occurred here was nothing more than a decision by the International not to pursue the grievance to arbitration."

(Bd. dec. p. 17)

Member Cracraft emphasized an important difference between a negotiated settlement and a decision not to arbitrate a grievance. In a settlement, the merits of the respective positions of the parties is likely to affect the outcome. In this case, the International had a blanket policy of not taking any grievance to

arbitration if the GPC recommended a resolution.[6] Berry's grievance was dropped not because, on the merits, it was not likely to be won, but because the GPC made a recommendation.

Administrative Law Judge Buschmann was concerned that the International had put its own interests ahead of Berry's in not moving the grievance to arbitration:

> "it is plausible to conclude that the interests of the International were not wholly congruent with those of Berry and Local 520, and that the International attempted to settle a larger controversy, i.e., Catalytic's and PECO's overall dissatisfaction with the pipefitters. Berry's interests may have been sacrificed to achieve the larger goal."

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[6]Member Cracraft noted other common union practices of not arbitrating discharge grievances where the employer offers reinstatement, or not arbitrating a case because the union cannot afford arbitration.

Judge Buschmann relied upon the NLRB precedents United Technologies Corp., 268 NLRB 557 (1984) (deferral inappropriate where union's interest are adverse to grievant's) and Combustion Engineering, 274 NLRB 215 (1984) (employee involvement in grievance settlement and concessions by both parties important). Judge Buschmann went on to find that Catalytic violated §8(a)(1) and (3) by discharging Berry.

If traditional Spielberg/Olin analysis had been applied here, the result would have been different. There was no agreement by the parties to be bound, for neither Local 520 nor Berry were parties to the GPPMA or to the GPC procedure, and strenuously objected to the resolution. There is no indication whatsoever that the statutory issues were presented to the GPC; indeed, the evidence indicates that

they were not. And the result--that Berry received no remedy at all--is clearly "repugnant to the Act" under the NLRB's own holdings. See, e.g., Cone Mills Corp., 273 NLRB 1515 (1985), rev'd sub nom Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986), on remand, 298 NLRB No. 70 (1990), where the Board held that an arbitrator's finding that the employee had been improperly discharged, but award that she be reinstated without back pay, was "repugnant to the Act." One wonders how the same Board and Court that decided Cone Mills (Darr) on remand could have ruled against Berry in the instant case.

It is necessary for the Supreme Court to grant the Petition for Certiorari in order to establish some control over the NLRB's newest deferral policy. This policy abandons Board jurisdiction over violation of statutory rights to such an

extent as to leave individual employees virtually without protection. The Circuit Court's affirmance of the Board action amounts to a wholesale grant of authority to continue this practice.

The NLRB's policies have always been grounded in an attempt to balance two express interests of the National Labor Relations Act: the Board's own unfair labor practice jurisdiction to protect the important statutory rights granted by §8, and the public policy of encouraging private resolution of labor-management disputes. The many Courts of Appeals decisions reviewing NLRB deferral actions rather consistently emphasized restrictions on the Board's deferral of its statutory jurisdiction, insisting that protection of statutory rights is the pre-eminent function of the Board. Taylor v. NLRB, supra.

The instant case is the first case in which a Court of Appeals has approved and encouraged the wholesale abandonment of the board's statutory jurisdiction over unfair labor practices. As such, it conflicts with the decisions of other Circuits.

CONCLUSION

The Circuit Court's decision adopts a waiver-of-rights theory that is inconsistent with the methods of review of NLRB deferral universally applied by other Courts of Appeals. Moreover, it contradicts the "explicit waiver" requirement applicable to union waivers of employee statutory rights set by the Supreme Court in Metropolitan Edison v. NLRB.

Never before has the NLRB deferred to a grievance resolution giving so little

assurance that employee statutory rights have been considered and protected. Such a deferral could be upheld by a Court of Appeals only by using the improper "waiver" theory advanced by the District of Columbia Circuit in this case.

The Supreme Court should grant the Petition for Writ of Certiorari to eliminate this conflict between the District of Columbia Circuit and the other Courts of Appeals, and the plain conflict between the Circuit Court's use of the waiver-of-rights theory and Metropolitan Edison.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER,
PLUMBERS AND PIPEFITTERS
LOCAL UNION NO. 520

132 State Street
Harrisburg, PA 17101
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Date: 08 May 1992

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CATALYTIC, INC.

and Case. 4--CA--15320

PLUMBERS AND PIPEFITTERS
LOCAL UNION NO. 520

Margaret M. McGovern, Esq.,
for the General Counsel,
Francis M. Milone, Esq.
(Morgan, Lewis & Bockius),
of Philadelphia, Pennsylvania,
for the Respondent,
James L. Cowden, Esq.,
(Handler, Gerber, Johnson, Strokoff)
of Harrisburg, Pennsylvania, on
behalf of the Union.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case arose on a charge filed on September 18, 1985, by Plumbers and Pipefitters Local Union No. 520 and a complaint issued by the General Counsel of

the National Labor Relations Board on January 30, 1987, against Catalytic, Inc. The complaint alleges that the Respondent, Catalytic, Inc., violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging its employee Garland Berry. The Respondent's answer admits the jurisdictional allegations of the complaint, the status of Neal Greeley and Lou McCullough as supervisors, and the discharge of the employees, but it denies the allegations of unfair labor practices and, as an affirmative defense, submits that the Board should defer to the resolution of the grievance procedure.

The case was tried before me on April 20 and May 1, 1987, in Harrisburg, Pennsylvania, where all parties were given an opportunity to introduce relevant evidence, to examine and cross-examine

witnesses, and to make oral argument. Briefs were filed by the General Counsel, the Charging Party, and the Respondent on June 5, 1987. Based on the whole record[1] in this case and from by observation of the demeanor of the witnesses, I make the following

Findings of Fact

Catalytic, Inc. is a Pennsylvania corporation with its main office located in Philadelphia, Pennsylvania, from where it conducts its business of general construction. It is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Plumbers and Pipefitters Local Union No. 520, is a labor

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[1]Respondent's Motion to Reopen the Hearing is denied.

organization within the meaning of Section 2(5) of the Act.

The Issues

At issue is whether deferral to the contractual grievance procedure is justified and, if not, whether the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Garland Berry.

The Facts

Catalytic, as an engineering contractor, was performing maintenance work on a nuclear generating plant for the Philadelphia Electric Company (PECO) at its Peach Bottom site. The Respondent employed approximately 25 to 30 plumbers and pipefitters at that site to provide the necessary maintenance when the plant

was operating. During outages the number of employees usually increased to anywhere from 150 to 300. These employees were members of Local 520 which is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the International). The International is one of 14 international building trades unions which are signatories to a collective-bargaining agreement, known as the General Presidents' Project Maintenance Agreement (Presidents' Agreement) (R. Exh. 2). This document in article VII provides for a grievance and arbitration procedure consisting of four steps, the last of which is arbitration.

Garland Berry was a member of Local 520 and had been employed by the

Respondent as a pipefitter since 1979. Since April 1, 1984, he was the steward at the Peach Bottom site for Local 520. During the summer of 1985 PECO assigned to Catalytic the work to remove and to reinstall snubbers, devices designed to operate as shock absorbers in a nuclear reactor. The repair work was awarded by PECO to another contractor over the objections and complaints of Local 520.

In August, Catalytic informed Berry and the eight-man crew of pipefitters who had been working the day shift that it would be split into two shifts, four on the day shift and four on the second shift. Catalytic's foreman, Ike Pritchard, also told Berry that the split would go into effect on Tuesday following Labor Day. Berry promptly informed August Hartinger, the business agent for Local

520, of that decision. Hartinger was opposed to the splitting of the crew and called Lou McCauley, the project manager, and Neal Greeley, the labor relations manager, and informed them that he opposed management's decision to split the crew. Hartinger, unable to resolve the matter on Friday, instructed Berry to have the eight-man crew report for work at their normal starting time on Tuesday. In the presence of Foreman Pritchard, Berry instructed the men to report for the day shift on Tuesday which in effect disregarded management's earlier instructions. Greeley reported the disagreement to the International's representative Frank DeLuca on the following day. DeLuca agreed to comply with management's decision to have four men report for the first shift and four in

the afternoon for the second shift. Greeley, DeLuca and Hartinger discussed the problem again in a telephone conversation on Saturday afternoon and also agreed to a meeting to discuss grievances and PECO's refusal to assign more work to the pipefitters. Following these discussions, the crew reported for work as agreed on a split-shift basis. On Thursday, September 12, the parties met. President were Neal Greeley and Lou McCauley representing Catalytic and Frank DeLuca and Gus Hartinger for the Union. Garland Berry attempted to attend the meeting but was excluded by Catalytic's representatives. Greeley immediately informed the Union that the Company wanted Berry dismissed and that Berry would be discharged on the ground that he had made threats to a welding inspector. Greeley

stated that "they were having problems with Garland as the steward, that he had his nose into company business they didn't feel that he should be involved in, that even PECO was having a hard time accepting him as a steward, that they wanted him dismissed, they didn't want him on the project any more, he was too much of a trouble maker." (Tr. 24.) Hartinger, after consulting with Berry outside the meeting room, denied that he had made any threats to a welding inspector. Hugh McNally, a supervisor with PECO, was called in and confirmed his belief that Berry had made such threats. Nevertheless, DeLuca and Hartinger insisted that Berry was not the one who had intimidated the inspector and resisted any attempts to take adverse action against him. The meeting ended with a

discussion of PECO's dissatisfaction with Local 520 and the Respondent's agreement to investigate the threat incident before taking any action. On the following day, after Berry had returned to work, he was informed by McCauley that he was discharged. Berry testified as follows about that conversation (Tr. 118):

> After he took me out of earshot from everybody, he told me that, Garland, I guess you gathered that the way that meeting went, the way they were really gunning for you, we had to discharge you. We're going to get rid of you.
>
> He said there was a meeting in downtown Philadelphia and Garland had to go. And he was instructed to discharge me. At that point in time, I asked him what the charge was.
>
> He said gross insubordination. And I said, Lou, what is your definition of gross insubordination. He said, Garland, simply for getting into Catalytic's business.
>
> And I asked him if I were eligible for rehire. He said, as far as I'm concerned, I don't have any problem with hiring

you, Garland. That's what he told me.

McCauley also called Hartinger informing him that Berry was dismissed for "gross insubordination." As recalled by Hartinger, McCauley said as follows (Tr. 28):

> [T]hey weren't firing Garland for the welding inspector thing, they were firing him for gross insubordination. . . .[T]hey weren't pleased with the way he told the four men that I had told not no come in on the Tuesday after Labor Day, they were very displeased that he would go out and tell people something like that; therefore they were going to dismiss him.
>
> They figured that was gross insubordination.

The Union filed a grievance under the President's Agreement on behalf of Berry with the International. Under that procedure the Local, which is not directly

involved in the grievance process, sent a telegram to the president of the International. Several days after the discharge, Berry, accompanied by Hartinger and DeLuca, met with the two representatives of the International in Washington, D.C., Ed Moore and R. W. Baines, assistants to the president. Moore attempted to but could not resolve the matter with David McIntyre, the Respondent's vice president for labor relations. A second meeting took place a week later between McIntyre and Greeley for the Company and Moore and DeLuca for the Union. Again the dispute remained unresolved, although DeLuca testified that it had been his impression after the meeting that Berry would be reinstated. However, because charges had been filed before the Board, both sides assumed that

the matter was out of their hands and they failed to resolve the issue.

The International took the grievance to the third step by submitting it to the General Presidents' Committee, a body of 14 or 15 craft union presidents who are signatories to the Presidents' Agreement. Frank Coyne, the representative of the United Association to that committee, presented the grievance to the committee on behalf of the Union, and the Respondent's position was presented by Greeley. The record shows that Greeley also submitted a written report, but the record is not clear how extensive a written report was presented on behalf of the Union. (R. Exhs. 1, 8; Tr. 305--307). However, Coyne, who unlike Greeley had not been involved in the prior negotiations, was briefed orally by DeLuca

and in writing by Assistant President Baines. The Presidents' Committee did not meet until January 15, 1986. Coyne made a brief oral presentation before the committee and requested that Berry be reinstated with backpay. Greeley made an oral presentation and turned over a written report on behalf of the Employer (R. Exh. 11). The decision of the committee, contained in a letter, dated January 21, 1986, to Catalytic, was (G.C. Exh. 3):

> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

In a letter dated February 11, 1986, Hartinger urged the International to take

the case to arbitration stating, inter alia (G.C. Exh. 9):

> I would appreciate your views on this matter for I felt then, and I still do, that Garland was dismissed for trying to enforce the G. P. H. on behalf of the United Association. Therefore, I still feel that Garland should be reinstated, not rehired, and should receive full compensation for lost wages he is entitled to.

Hartinger received a response, dated March 6, 1986, in which Ed Moore, assistant general president of the International, informed the Local that:

> [A] hearing was held and it was agreed that Mr. Berry would be rehired but not entitled to back pay. Because of the agreement of the General Presidents' Committee, there is no further step as far as arbitration. The only time it goes to arbitration is when the committee cannot agree to a solution. (R. Exh. 9)

Berry was rehired in April 1987.

Because McCauley had told Berry and Hartinger already in October 1985 that Berry was eligible for rehire, and because other employees who are discharged for cause are subsequently eligible to be rehired, Local 520 and the General Counsel view the decision of the presidents' Committee as meaningless. Moreover, the General Counsel and the Charging Party submit that Berry "was discharged in retaliation for his activities as steward," and that the given reason for his discharge, namely, insubordination, was a pretext. According to the Respondent, the discharge was not related to Berry's activities as a union steward.

Analysis

Garland Berry had been a satisfactory employee at Catalytic since 1979 at the

Peach Bottom site. He had no record of disciplinary problems; to the contrary, he had been considered by management for a supervisory position. However, in his role as a shop steward since 1984 he was perceived by management to cause problems for Catalytic and its relationship with PECO. According to Berry's testimony, three incidents occurred which demonstrated Catalytic's frustration and hostility toward him as a steward.[2] In May or June 1985, Berry met Michael McMahon, a maintenance supervisor, in the hall as he came out of another supervisor's office. "He threw his hands up in the air and said, I quit, I give up,

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[2]With the exception of the incident involving Supervisor McMahon, the two other incidents are not contradicted. McMahon's testimony impressed me as too equivocal to be convincing. I therefore credit Berry's version of the incident.

you're the only [son-of-a-bitch] that I can't win anything from on site" (Tr. 105) Right after that encounter with McMahon, Berry was called into the office of John Booth, a construction supervisor and, according to Berry, "he sat me down to his left, and he--began to tell me tnat he was very disenchanted with some of the derogatory remarks he had heard that I had been making around the site, suggested that I watch my mouth." Booth also informed him "that he didn't particularly like the way I did business on the telephone [and] . . . that he wasn't too happy with my selection as the union steward." (Tr. 106). Booth then turned to another supervisor in the office and, in the presence of Berry, said, "I want to know where this son-of-a-bitch is every minute of every hour of every day on this

site, and I want a job assignment in front of him at all times" (Tr. 106). Berry had a similar conversation with Lou McCauley, the site manager. Berry testified that after McCauley learned of the decision of the Local not to split the work crew, he got angry and said that he "never had so damn many grievances" in his entire tenure than he had since Berry became the steward (Tr. 107).

The Respondent argues that these statements, even if made, do not reflect union animus and had no reasonable connection with the discharge, as none of these supervisors were involved in the discharge. The General Counsel, however, states, and I agree, that the Respondent was frustrated with what it perceived was the inflexibility and obstinance of Local 520 regarding changes in assignments.

Even though the Respondent knew that Berry was merely following the orders of Hartinger, the only way to retaliate against the Local was through Berry. Catalytic, the subcontractor to PECO, was repeatedly informed of PECO's dissatisfaction with the performance of the pipefitters. For example, Greeley testified about his conversation with DeLuca about Berry's refusal to staff the staggered shift (Tr. 169):

> And again I reviewed for Mr. DeLuca the situation and the history with 520 as far as their activities which had taken place in March; basically their interjecting into our management decisions, which we were in the outage, basically we were being viewed by Philadelphia Electric as being a--not controlling the situation.

The Respondent also refers in its brief repeatedly to "PECO's dissatisfaction with the "pipefitters" and explains that

"PECO's dissatisfaction with the pipefitters stemmed from an incident in the spring of 1985 in which Local 520 had refused to man an emergency water service job at Peach Bottom because it was protesting Catalytic's implementation of a staggered work week" (R. Br. 5, 8, 9). In an interoffice memorandum, dated October 16, 1985, Greeley gave his version of the scenario leading to the Berry discharge, stating, inter alia (R. Exh. 11):

> Lou advised Mr. Hartinger that the PECO maintenance division felt uncomfortable with the pipefitters attitude and performance because of the March incident and wanted the majority of the work to be completed by in-house maintenance forces.

That memorandum also blamed Berry for a March incident involving disagreement over

"a staggered work week" causing considerable revenue loss to PECO.

It is abundantly clear that Catalytic was frustrated with Local 520 generally and displeased with its decision to oppose the splitting of the shift. However, this was not the initial reason given by the Respondent for Berry's discharge. At the September 12 meeting with DeLuca and Hartinger, Greeley announced the decision to fire Berry because of threats made to a welding inspector. This reason, however, was substituted by another after the Respondent discovered that Berry was not the one who had made such threats. Indeed, that reason was also inconsistent with Greeley's written memorandum explaining the discharge (R. Exh. 11). Greeley stated there that "Catalytic will not have Mr. Berry becoming involved in

management decisions and as a result of his actions [discussed] Catalytic's intentions of dismissing Mr. Berry" (R. Exh. 11). Whether or not the Respondent had indicated prior to the September 12 meeting that Berry would be discharged, it is certainly clear from Hartinger's testimony that Berry had long been considered by Catalytic's management as a steward who "had his nose into company business" and by PECO as "too much of a troublemaker" whom they wanted dismissed (Tr. 24). After both sides had agreed during their meeting on September 12 to have the crew report for the split shift as requested by management, and after management had determined that its basis for Berry's discharge, namely, the threat to the welding inspector, was unfounded, it nevertheless discharged Berry on the

following day, Friday, September 13, "for gross insubordination for directing a work stoppage" (R. Exh. 11). This, of course, referred to Berry's actions on Friday, August 30, when he relayed Hartinger's order to the pipefitters that they were to report as usual on Tuesday, September 3 at 7:30 a.m., rather than comply with management's request for the split shift. Greeley and other management officials of the Respondent were aware that Berry had not initiated this action, and that he had followed the instructions of his manager, Hartinger. All this suggests a basic insincerity involved in the Respondent's conduct and its handling of the discharge, and gives credence to the General Counsel's argument that the Respondent sought to discharge Berry not for misconduct on his part, but because he was

Hartinger's spokesman on the site and because of Respondent's and PECO's dissatisfaction with Local 520 and its resistance to changes in assignments.

The Respondent argues strenuously that "there is simply no reasonable basis in the record for inferring that Catalytic had any basis for being upset with Berry because of his activities as a union steward" and the "evidence in the record simply will not support the conclusion that Mr. Berry's activities as a union steward were a 'substantial and motivating factor' in his discharge," even considering the statements made by several supervisors, because they were not directly involved in the decision to terminate him (R. Br. 29, 35). Yet it is clear that the "gross insubordination" attributed by the Respondent to Berry was

committed in his capacity as a union steward. Moreover, the record is replete with evidence that Catalytic and PECO were generally critical of Berry as a steward and wanted him out. This is evident not only from the remarks made by the three supervisors of Catalytic but also from the general tenor of the evidence. Greeley testified at length about PECO's dissatisfaction with the pipefitters generally and PECO's desire to have Berry terminated. Since PECO stood to loose money during an outage, the pressure increased on Catalytic to help remedy the situation. In Catalytic's opinion Local 520 had been "interjecting into our management decisions." In PECO's opinion, Catalytic was "not controlling the situation," they "were in a very difficult situation" where "the client sits in our

offices . . . watching the situation," where the contract with PECO was to expire in 3 or 4 months, and where PECO "wondered who was running the job" (Tr. 169-170). Considering these circumstances and also aware that PECO wanted Catalytic to discharge Berry, Catalytic complied.

I disagree with the argument of the Respondent that the discharge of Berry was unrelated to his activities as a union steward. Moreover, the fact that the Respondent based the discharge on an unfounded and erroneous reason and then changed the basis of the discharge to the directive which had been resolved at the meeting of September 12, shows that the Respondent had decided to terminate Berry and was searching for a more suitable reason. Considering the Respondent's shifting reasons for the discharge, the

comments by several supervisors, the admitted dissatisfaction of PECO with the pipefitters, the conclusion is compelling that Berry was discharged because of his activity as a union steward. I do not view the "insubordination" incident as separate and distinct from Berry's performance as a steward and, accordingly, do not find a dual motive for the discharge. Compare, Wright Line, 251 NLRB 1083 (1980). However, assuming arguendo that this incident should be considered independently, I cannot find that Berry's instructions to his crew could be regarded as gross insubordination, because he merely acted as the messenger of Hartinger's orders. But even if it could be construed to amount to insubordination, the evidence is clear that it was a pretext. This is clear from the

Respondent's conduct in seizing initially upon another, unfounded incident as a reason. Moreover, the instructions to the crew were subsequently countermanded in accordance with the Respondent's wishes and the matter had become a moot issue. Without the Respondent's union animus and Berry's activities as a steward, it is clear that Catalytic would not have discharged Berry as a result of the Labor Day incident.

The more difficult issue in this case is the Respondent's argument that the Board should have deferred the matter to the grievance procedure of the collective-bargaining contract. Generally, the Board finds deferral appropriate where a grievance procedure is available to the parties to resolve their dispute. Spielberg Mfg. Co., 112 NLRB 1080 (1955);

Dubo Mfg. Corp., 142 NLRB 431 (1963); Collyer Insulated Wire, 192 NLRB 837 (1971). The basic criteria to be applied in determining whether deferral is appropriate are that all parties agreed to be bound, that the proceedings were fair and regular, and that the decision of the arbitration was not repugnant to the Act. Spielberg Mfg. Co., supra. In Olin Corp., 268 NLRB 573 (1984), the Board further explained that the contractual and statutory issues should be factually parallel. The Board will not only defer under such circumstances to an arbitrator's award, but also to a prearbitation settlement. Combustion Engineering, 272 NLRB 215 (1984). The record here shows that the grievance procedure consisted of four steps. The parties stopped short of the last step,

namely arbitration, and arrived at a settlement decision in step three by the General Presidents' Committee. Its decision was stated in a letter dated January 31, 1986, by Thomas Owens, administrator (G.C. Exh. 3):

> At the last regular meeting of the Presidents' Committee, a Step III grievance was reviewed involving Garland Berry, member of UA Local 520 terminated from the Peach Bottom Nuclear Power Place, Delta, Pennsylvania project.
>
> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

The decision was accepted by Catalytic and the International. However Hartinger representing Local 520 requested the International by letter dated February 11, 1986, to take the matter to arbitration.

(G.C. Exh. 4) He, inter alia, stated: "I still feel that Garland should be reinstated, not rehired, and should receive full compensation for lost wages he is entitled to. . . . [Y]ou told Catalytic that the U.A. would take this case the whole way to arbitration and I find this is necessary." On March 6, 1986, assistant general president of the International wrote to Hartinger: "Because of the agreement of the General Presidents' Committee, there is no further step as far as arbitration. The only time it goes to arbitration is when the committee cannot agree to a solution . . . . .[T]he U.A. has taken them to the highest step in the grievance procedure and will consider this case closed." (R. Exh. 9.)

The Respondent naturally submits that the Olin Corp. standards were met and that deferral is appropriate. The General Counsel argues that "the relationship here is actually three sided, involving Respondent the International Union and the Local Union" (G.C. Br. 14) The Charging Party would add the individual, Garland Berry. Moreover, according to the General Counsel, "the record reflects a certain tension among these parties. . . [whose] interest are not wholly aligned." Because the Local and the individual had no direct role at all in the process of the grievance at step III, it is the General Counsel's position that deferral is inappropriate. The Charging Party and the General Counsel also argue that the decision to rehire without backpay is meaningless because any employee, even

after discharge for cause, could be rehired. Berry was rehired after several months and did not receive any backpay. Although the Charging Party further argues that none of the Spielberg and Olin standards were met in this case, clearly the most troubling issue is that Local 520 and Berry as an individual did not participate directly in the settlement, nor did they fully accept its decision. In United Technologies Corp., 268 NLRB 557, 5600 (1984), the Board stated, inter alia, as a guiding principle that "it has refused to defer where the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee." To be sure, the interests of the International here were not necessarily adverse to those of Berry,

but it is plausible to conclude that the interests of the International were not wholly congruent with those of Berry and Local 520, and that the International attempted to settle a larger controversy, i.e., Catalytic's and PECO's overall dissatisfaction with the pipefitters. Berry's interests may have been sacrificed to achieve the larger goal. In Combustion Engineering 272 NLRB 215, 217 (1984), the Board recognized the importance of the individual's involvement in the settlement agreement and the parties' respective concessions in arriving at a settlement. Here, of course, Berry was not involved in the settlement process, nor did the Respondent make any concessions. To the contrary, the Respondent's position was accepted in spite of the objections of Local 520. In a recent case, Alpha Beta

Co., 273 NLRB 1546, 1547 (1985)[3], the Board reemphasized the importance of the requirement that all parties agreed to be bound. The Board there observed:

> All parties had agreed to be bound, including the employees. Although the employees were not themselves involved in the settlement negotiations, they were fully informed as to the specific terms of the proposed settlement by the Unions. Indeed, the Unions left the final decision of acceptance or rejection of the proposed settlement up to the employees, who knew that it did not contain any provision of backpay. Instead of rejecting the settlement on that basis, and without expressing any dissatisfaction to the Respondents, the employees authorized the Unions to accept the settlement agreement on their behalf. Thus, the employees were bound by the Acts and those of the collective-bargaining representative.

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[3]See also Thatcher Glass MFg. Co., 265 NLRB 321 (1982).

The record here shows clearly that Local 520, which represented Berry's interests, disagreed with the settlement as shown in its letter, dated February 4, 1986, to the International requesting that the matter be taken to arbitration. In sum, the record here shows that all parties did not agree to be bound and that all parties did not participate in the grievance process' third step. Accordingly, I agree with the General Counsel and the Charging Party that deferral is not appropriate under these circumstances.

Conclusions of Law

1. Catalytic, Inc. is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Plumbers and Pipefitters Local Union No. 520 is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Garland Berry because of his activities as a union steward, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Upon concluding that the Respondent has engaged in certain unfair labor practices, I find it necessary to recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies

of the Act. Having unlawfully discharged Garland Berry, the Respondent shall offer him reinstatement, and make him whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987).[4]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

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[4]Under New Horizons for the Retarded, supra, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. §6621.

[5]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings,

ORDER

The Respondent, Catalytic, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee because he engaged in union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Garland Berry immediate and full reinstatement to his former job

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conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination practiced against him in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the discharge of Garland Berry and notify him in writing that this has been done and that evidence of his discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records,

time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due him under the terms of this Order.

(d) Post at the Respondent's place of business in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 50 consecutive days in conspicuous places including all places where notices

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[6]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 23, 1988.

/s/
Karl H. Buschmann
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
As Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities

WE WILL NOT discharge employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Garland Berry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without

prejudice to his former seniority or any rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from the discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharges of Garland Berry. WE WILL notify him that this has been done and that evidence of his unlawful discharge will not be used in any way as a basis for future personnel action against him.

CATALYTIC, INC.

(Employer)

Dated ---------- By----------
(Representative)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania 19106-4404, Telephone 215--597--7643.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CATALYTIC, INC.

and Case 1--CA--15320

PLUMBERS AND PIPEFITTERS
LOCAL UNION NO. 520

DECISION AND ORDER

On August 23, 1988, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions[1] and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

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[1]The Respondent's request for oral argument is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this proceeding is whether the Board, in the exercise of discretion, will defer to a contractual grievance settlement prior to arbitration by the employer and the collective-bargaining representative, where that settlement is opposed by the grievant and his local union, which is not the bargaining representative or a party to the contract. The judge refused to defer because the grievant, who was affected by

the settlement, and his local union, which was present at the first step of the grievance procedure, refused to accept the settlement. For the reasons set forth below we defer to the settlement and dismiss the complaint.

I. Background

A. The Work Dispute and Berry's Discharge

The Respondent is an engineering contractor engaged, inter alia, in performing maintenance service for Philadelphia Electric Company (PECO) at the latter's Peach Bottom nuclear generating plant in Delta, Pennsylvania. The Respondent's craft employees at Peach Bottom are covered by the general president's Project Maintenance Agreement (GPA), negotiated on a nationwide basis with 14 International Building Trades

Unions, to which the Respondent is signatory. The Charging Party, Plumbers and Pipefitters Local Union 520, supplies employees to employers at the job, but it is not a party to the contract. It is, however, an affiliate of one of the contracting Internationals, the United Association.[2] The United Association is the recognized bargaining representative.

The level of Respondent Catalytic's craft work force fluctuates considerably, as is typical on such a site, depending on the level of work assigned to the Respondent by PECO. The number of craft employees is generally highest during an outage, which is a shutdown of the power generating unit, which occurs either on a

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[2] United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

planned or an emergency basis. In August 1985, during such an outage, PECO assigned the Respondent a job involving the removal and reinstallation of "snubbers" (shock absorbers). PECO retained the repair work on the snubbers, which it then awarded to a different contractor. Local 520's business manager, Hartinger, protested this assignment and told the Respondent that it should tell PECO that the pipefitters should be assigned all the work and, if not, the pipefitter would not do any part of it. On Thursday, August 29, the Respondent informed its pipefitter employees that the snubber removal work would be done in two shifts beginning the following Tuesday, the day after Labor Day. Local 520's steward, Garland Berry, reported this to Local 520 Business Manager Hartinger, who disagreed.

Hartinger said he would talk to the Respondent and get back to Berry. In the meantime, Berry and the Respondent's general foreman, Pritchard, together selected which employees would work the morning and afternoon shifts.

Just prior to quitting time of Friday, August 30, Berry, who had again been in touch with Hartinger, countermanded the Respondent's orders in Pritchard's presence. Berry told the men that, contrary to the Respondent's directions, they should all report at their prior, morning-shift time on Tuesday, instead of at the two shifts designated by the Respondent. One of the employees asked Berry whether he should take his directions from Berry or from the Company. Berry told him that he should

always take his directions from the local business manager.

Berry's directive to the employees was reported that same day to the Respondent's site manager, McCauley. McCauley, in turn, reported the directive to the Respondent's labor relations representative for the Peach Bottom site, Neil Greeley, in Philadelphia. Greeley called the United Association's International representative for the site, Frank DeLuca, that evening but missed him. On Saturday morning, August 31, Greeley talked to Deluca and then had a three-way conversation with Deluca and Hartinger. Deluca agreed that the job was to be manned in accordance with the Respondent's instructions under the GPA, and so directed Hartinger. Deluca, however, also requested a meeting with the Respondent

and PECO to discuss PECO's failure to give all the work on repair of the snubbers to the pipefitters. Greeley agreed to arrange a meeting.

Due to schedule conflicts, the meeting was not held at the site until September 12. At the outset of the September 12 meeting, a complaint was raised about an incident concerning intimidation of a welding inspector, that PECO believed involved Berry. The Respondent had learned of the incident that morning from PECO. The remainder of the meeting apparently focused on Berry, without much substantive discussion concerning PECO's work assignments. (Investigation later that day disclosed that Berry was not involved in the welding incident.) The next day, Berry was discharged by the Respondent, which cited

as gross insubordination Berry's directive to employees on Friday, August 30, countermanding the Respondent's orders.

B. The Grievance and the Settlement

A grievance concerning Berry's discharge was filed the same day as the discharge and was processed through three steps of the GPA's grievance procedure. Step 1 of that procedure is a meeting between the aggrieved employee and/or the "on-site representative" and the employee's immediate onsite staff supervisor. It is understood that the onsite representative has permission to phone the office of the administrator of the general president's Project Maintenance Committee for guidance in any situation that may arise. On grievances involving disciplinary action, or disputes

relative to local wages and fringe benefits arising under the agreement, a representative of the Local Union is included in the step 1 meeting. Step 2 involves an International union representative, the Local union representative, and the contractor's labor relations manager. At Step 3, the information prepared for step 2, plus any other supplemental information, facts, or positions developed in step 2, are submitted in writing to the general president's committee.[3] If agreement is not reached at that stage, either party may appeal to an arbitrator.

In this case, in preparation for step 2, International Representative Deluca,

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[3] The general president's committee includes a representative of each of the GPA signatory unions.

Local Business Manager Hartinger, and Berry met in Washington, D.C. with M.E. Moore, assistant general president of the United Association, and his assistant, R. Baynes, and explained the Local's position. Moore called the Respondent's vice president, McIntire, to advise him of the United Associations's concern about getting the grievance settled. Approximately a week later, a step 2 meeting was held in Washington. Present were Moore, Deluca, and Baynes for the Union; and Greeley and McIntire for the Respondent. The parties discussed Hartinger's disagreement with PECO's decision to give only the removal and reinstallation work on the snubbers to the Respondent and the United Association's position with respect to Berry's authority at the jobsite. After the grievance was

discussed in detail, McIntire suggested that both sides take a few days to digest the grievance and get back in contact by phone. No resolution was reached.

In a January 2, 1986 letter to the administrator of the general president's committee, Marvin J. Boede, general president of the United Association, requested that a GPA step 3 grievance concerning Berry's termination be placed on the agenda for the next general president's committee meeting, to be held January 10 to 12. The letter "enclosed . . . copies of the United Association's and also the Company's position," and noted that Boede was sending a copy of the letter to the Respondent so that it would be aware of the date of the step 3 meeting. At step 3, both parties to the GPA, the Respondent and the United

Association, presented their positions to the committee. In a January 31, 1986 letter, Administrator Owens advised that:

> At the last regular meeting of the General Presidents' Committee a Step III grievance was reviewed involving Garland Berry, Member of UA Local #520, terminated from the Peach Bottom Nuclear Power Plant, Delta, Pennsylvania project.
>
> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediate rehire without any back pay.

Rather than invoking arbitration, both parties to the GPA contract, the Respondent and the bargaining representative, United Association, accepted this result[4] and deemed it final

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[4]Under the Respondent's project rules for the Peach Bottom site, the Respondent was not required to rehire Berry. The penalty for gross insubordination, the violation with which Berry was charged, is termination "for the length of the project. Eligibility for rehire will be

and binding. Although Local 520 was not a party to the contract, its business manager, Hartinger, protested that Berry should be "reinstated" rather than rehired, and should receive full compensation for lost wages.

C. The Judge's Decision

The judge found that the Respondent had violated Section 8(a)(3) by discharging Berry. The judge rejected the Respondent's argument that the Board should defer to the resolution arrived at

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reviewed on an annual basis."

The General Counsel argues that it is unclear whether Berry in fact was or would have remained ineligible for rehire for any appreciable length of time based on Berry's testimony that Site Manager McCauley stated at the time of Berry's discharge that McCauley would consider Berry eligible for rehire. However, it is undisputed that the Respondent's official policy at the site is to review eligibility for rehire annually.

through the grievance procedure of the collective-bargaining contract. He concluded that the Board had "re-emphasized the importance of the requirement that all parties agree to be bound" in Alpha Beta Co., 273 NLRB 1546, 1547.[5] He found that as Local 520 disagreed with the settlement, "all parties did not agree to be bound," and that "all parties did not participate in the grievance procedure's third step." On the merits, the judge held that Berry was discharged for his actions as Local 520's steward and that the gross insubordination attributed to him was committed in his capacity as union steward. The judge also observed that, even if the August 30 incident could be considered independently

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[5]273 NLRB 1546 (1985), petition for review denied sub nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987)

of his steward's duties, Berry's instructions to the employees could not be regarded as gross insubordination because he was merely acting under Hartinger's orders.

II. Discussion

The Respondent excepts both to the judge's failure to defer this matter to the grievance procedure's resolution, and to his decision on the merits.[6] We find merit in the Respondent's exception to the judge's refusal to defer and, therefore, find it unnecessary to pass on the merits.

The United Association (the bargaining representative) and the

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[6]In this regard, we note that the Respondent argued that the GPC decision was tantamount to an arbitration award and further argued that, if the decision is viewed as a settlement, deferral is appropriate under the standards set forth in Alpha Beta and Olin, see fn. 8 infra.

Respondent have accepted a resolution of Berry's grievance that was arrived at through the mechanism of the bargained-for grievance procedure. Thus, both deemed the general president's committee's disposition of the grievance to be final and binding.

The question is whether the agreement of the Employer and the bargaining representative to the general president's committee's resolution of the grievance is enough to warrant the Board's deferring to that resolution without the agreement of the affected employee or his local. The answer is found in Postal Service, 300 NLRB No. 23 (Sept. 28, 1990).

In Postal Service, we interpreted our Alpha Beta decision, and the Ninth Circuit's affirmance of the decision, as authorizing the Board to apply the

deferral principle of Spielberg[7] and Olin[8] to settlement agreements between the employer and the authorized bargaining representative that were reached during contractual grievance and arbitration proceedings, short of a final and binding arbitration award, even though the employee grievance opposed the settlement. We did so on the theory implicitly approved by the Ninth Circuit in Alpha Beta, that the employee's collective-bargaining agent was empowered to bind him, even without his consent.[9]

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[7]Spielberg Mfg. Co., 112 NLRB 1080 (1955).

[8]Olin Corp., 268 NLRB 573 (1984).

[9]In Postal Service, we stated:

> But the Union, as his collective-bargaining agent, was, in the words of the Ninth Circuit's affirmance of Alpha Beta, empowered to bind him

Here, Local 520, whose Business Agent Hartinger assisted Berry in the presentation of his grievance, is not the collective-bargaining representative. The authorized representative is the United Association, and the United Association is a party to the settlement of the grievance by the GPC to both parties' satisfaction. Thus, Berry's and Local 520's disapproval of the settlement does not defeat the case for deferral under our Postal Service

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> "wholly apart from [his] own separate consent." Further, we find that McCullough [the grievance and charging party] authorized the Union to settle the dispute when he invoked the contractual grievance procedure. [300 NLRB No. 23, slip op at 6. Footnote omitted.]

holding.[10] In this regard, contrary to our

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[10] Combustion Engineering, 272 NLRB 215 (1984), cited by the judge, is not to the contrary. In that case, the parties agreed to a settlement regarding employee Richard, which provided that he would be reinstated with no backpay, subject to a 120-day probationary period. The judge in that case declined to defer to the agreement on the grounds that he did not know "the nature, extent, or circumstances pursuant to which such settlements have been made." The Board found that the judge's analysis unconvincing and reversed. Thus, the Board stated

> The terms of the agreement suggest that both Richard and the Respondent made concessions in order to settle the grievance and avoid arbitration. Specifically, Richard agreed to forgo backpay and the Respondent agreed to reinstate him though not obliged to do so at that time. [Id. at 217. Emphasis added.]

Although the grievant himself appears to have agreed to the terms of the settlement in that case, that is not a prerequisite, as discussed above, and the Board's decision did not turn on that fact. Here, as in Combustion Engineering, both parties to the grievance procedure made concessions and settled the matter. The bargaining representative agreed to forgo backpay on Berry's behalf, and the Respondent agreed to make him eligible for rehire, although not obliged to so do

dissenting colleague, we conclude that the parties' mutually satisfactory resolution of the grievance through resort to the agreed-on grievance machinery is tantamount to a settlement agreement such as was involved in Postal Service. We further conclude that deferral to such a settlement furthers the purposes and policies of the Act favoring private resolution of labor disputes.[11]

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under its project rules for the Peach Bottom site.

[11]Conversely, we do not believe that it is either necessary or appropriate to interject ourselves into the parties' resolution of their grievance to determine if, in our view, sufficient negotiations or discussions occurred to merit deferral. Moreover, contrary to the dissent, we do not believe that the Board precedent relied on there warrants any such determination. Simply put, it is our view that a disposition satisfactory to the parties arrived at through their collectively bargained grievance resolution machinery is sufficient to merit deferral under Alpha Beta and Postal Service.

We also find Spann Building Maintenance Co., 289 NLRB No. 118 (July 15, 1988), relied on by our dissenting colleague to be inapposite here. In the case the employer made offers to settle employee Lewis' discharge grievance without backpay or seniority. Lewis declined those offers and filed a charge with the Board. About a week later, the company's personnel manager telephoned Lewis about filing the charge and made another offer, which Lewis refused. Finally, the company's personnel manager called Lewis just before issuance of the complaint and offered to reinstate her at a different building from the one where she had previously been employed--without backpay, without the previously offered seniority and vacation pay, and without any mention of settling either the pending

NLRB charge or the unresolved grievance. Lewis who had been of work for some 6 months, agreed to return to work. The Board found that the Respondent:

> . . . outside the channels of the grievance procedure and without involving the Union, contacted Lewis directly and arranged for her to resume working. This was clearly an effort by the Respondent to limit its potential backpay liability in the event that Lewis prevailed in her unfair labor practice case. This informal arrangement, entered into without the involvement of the Union . . . did not purport to be a settlement of the grievance. [289 NLRB No. 118, slip op. 5.]

The Board concluded that the fact that Lewis was reinstated "does not retroactively change the nature of the Respondent's arrangement with Lewis and transform it into a settlement." Thus, as the union had made it clear that it would

not proceed further in the grievance over Lewis' discharge, and the Board found that the grievance was not settled, the Board found it appropriate to determine the merits of the complaint. But the situation in Spann was totally unlike that presented here. Thus, in Spann no agreement was reached through the grievance mechanism, and the Respondent's offer to Lewis did not purport to be a settlement or resolution of either the grievance or the unfair labor practice charge. By contrast, in the instant case we are asked to defer to a disposition arrived at through the parties' collectively bargained grievance machinery in a situation in which both parties deem that resolution to be final and binding.[12]

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[12]Accord, Postal Service, supra.

It is, therefore, appropriate to examine the settlement in light of the general deferral principles enunciated in Alpha Beta, supra, and in Olin and Spielberg, supra. Those principles require that the proceedings be fair and regular, that all parties have agreed to be bound, and that the resolution is not clearly repugnant to the purposes and policies of the Act.[13] The first deferral criterion is satisfied here because there is no evidence that the grievance proceedings were anything but fair and regular. The parties' settlement satisfies the second criterion that all

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[13]The Board in Raytheon Co., 140 NLRB 883 (1963), further conditioned deferral on an arbitrator's having considered the unfair labor practice issue.

parties had agreed to be bound, as discussed above.[14]

We further find that the settlement in this case is not "clearly repugnant" to the purposes and policies of the Act. In Olin, supra, the Board stated it would not require an arbitrator's award to be totally consistent with Board precedent. Rather, the Board will not find an award to be "clearly repugnant" unless it is

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[14]We note that both Berry and Hartinger, like the grievant in Postal Service, supra, were familiar with the operation of the grievance and arbitration procedure. See Postal Service, supra at slip op. 6 fn. 11. And see Energy Cooperative, Inc., 290 NLRB No. 78 (July 29, 1988), where the Board gave effect to a strike settlement agreement between the union and the respondent employer, over objections of the individual charging party. The Board there noted the language of the Ninth Circuit, in affirming Alpha Beta, that "a union is empowered to bind employees it represents wholly apart from their separate consent." Id. at slip op. 9 fn. 16.

"palpably wrong."[15] In this case, the fact that Berry may not have received all the relief to which he (or Hartinger) believed that he was entitled does not render the settlement "palpably wrong."[16] Indeed, we find no indication that the resolution of the grievance is repugnant to the Act. Rather, the parties' settlement involved a compromise, with both sides making concessions and with Berry being made eligible for immediate rehire.

Finally, we conclude that the last deferral criterion referred to in Olin has been met in this case. The Board in Olin held that the unfair labor practice issue must have been considered by the arbitrator, and that this criterion is met

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[15]268 NLRB at 574.

[16]See Independent Stave Co., 287 NLRB 740 at 743 (1987); Postal Service, supra, slip op. at 7 and fn. 13.

when the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Olin, supra, 268 NLRB at 574, and cases cited there. Further, the Board held that the party seeking to defeat deferral bears the burden of showing that the Olin standards have not been met. Where, as here, a settlement is reached prior to arbitration, the criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice issue. Here, the record shows that these aspects have been met, and the General Counsel has not

raised a genuine issue with respect to the Olin standards.

III. Conclusion

We shall defer to the settlement arrived by the parties through the mechanism of their grievance procedure and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 28, 1991.

/s/
Dennis M. Devaney, Member

/s/
Clifford R. Oviatt, Jr.,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I find that the instant case does not involve a grievance settlement, but merely a union's decision not to appeal a grievance to arbitration. Accordingly, I find Postal Service, 300 NLRB No. 23 (Sept. 28, 1990), and Alpha Beta, 273 NLRB 1546 (1985), affd. sub nom. Mahon v. NLRB, 808 F.2d 1342 (9th Cir. 1987), dealing with deferral to negotiated grievance settlements, to be inapplicable.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the International) is signatory to the general presidents' Project Maintenance Agreement, the relevant collective-bargaining agreement. The Charging Party, Plumbers and

Pipefitters Local Union No. 520 (the local union), while affiliated with the International, is not a party to this agreement. The grievance procedure in that agreement consisted of four steps.[1]

Garland Berry, a member of the local union, was the steward for Local 520. Berry was informed that he was discharged

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[1]The first step requires a grievance to be discussed by the employee or his onsite representative and the supervisor involved. If it is not resolved at that stage, it is discussed between an International union representative and Catalytic's labor relations manager. If still not resolved, it then proceeds to step 3 and is submitted in writing to the general presidents' committee (GPC), a body of 14 or 15 craft union presidents who are signatory to the presidents' agreement. Both Catalytic and the International make presentations to the GPC. The GPC then issues a recommended decision that is reviewed by Catalytic and the International. If either party is dissatisfied, it can proceed to step 4, arbitration. If the matter is not submitted to arbitration, the record indicates that the recommended decision of the GPC becomes final and binding on the International and Catalytic.

by the Respondent on September 13, 1985. The local union filed a grievance concerning the discharge with the International on Berry's behalf. The grievance remained unresolved through the second step. The International then took the grievance to step 3 by submitting it to the general presidents' committee (GPC).[2] The GPC found the following:

> After hearing statements from both parties and carefully examining all of the evidence submitted, it was the position of the committee that Garland Berry should be made eligible for immediately rehire without any back pay.

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[2]The International representative made a brief oral presentation before the committee and requested that Berry be reinstated with backpay. Catalytic's labor relations manager made an oral presentation and submitted a written report.

Subsequent to that decision, the local union, which is not directly involved in the grievance procedure, urged the International to take the case to step 4, arbitration. The International refused, taking the position that the only time a case goes to arbitration is when the GPC cannot agree to a solution. The International stated that the "U.A. has taken them to the highest step in the grievance procedure and will consider this case closed."

My colleagues term the parties' decision not to pursue the Berry grievance to arbitration a "settlement." My colleagues then apply the principles of Postal Service and Alpha Beta to this so-called settlement and conclude that the General Counsel has not satisfied his burden of showing that deferral is not

warranted. Accordingly, they dismiss the complaint.

I cannot join my colleagues' decision because I disagree with their basic premise. Simply stated, there was no grievance settlement in this case. Certainly, as the Respondent argues in its brief, the GPC decision did not constitute a negotiated settlement of Berry's grievance.[3] There were no direct discussions between the Respondent and the International. Rather, the Respondent and the International presented their respective positions to a third party, the

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[3]In its exceptions, the Respondent's primary contention is that the GPC decision is similar to an arbitration award and should be deferred to under the principles set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955). I disagree. Where, as here, the parties' own procedure provides for arbitration but the grievance is not processed to that final step, I find Spielberg inapplicable. See Whirlpool Corp., 216 NLRB 183, 186 (1975).

GPC, which issued a decision. The mere fact that that decision became final when the International decided not to invoke step 4 of the grievance procedure does not transform the resolution of the grievance into a "settlement."

The facts of Postal Service and Alpha Beta are entirely different. In those cases, direct employer-union discussions were held, both sides made concessions, and agreements were reached. The Board found that the grievances were settled and concluded that deferral was warranted under the standards set forth in Olin Corp., 268 NLRB 573 (1984). The Board did not state or even suggest in Postal Service or Alpha Beta that every resolution of a dispute in the context of the grievance procedure would constitute a "settlement" worthy of Board deference.

On the contrary, in the seminal case of Alpha Beta the Board twice emphasized the importance of the parties' having resolved their differences through the negotiation process. First, the Board quoted with approval the view of former Member Penello, as follows:

> Deferral in general will encourage parties . . . to negotiate rather than to litigate their differences....
>
> The Board should encourage employers and unions to negotiate their differences arising during the term of their bargaining agreement, to discuss and settle grievances, and, if necessary, to arbitrate their differences. [273 NLRB at 1547. Emphasis added.]

Second, in finding that the disposition of the grievances was not "palpably wrong" under the law, the Board relied on the fact that there had been "negotiations

between the Respondents and the Unions." 273 NLRB at 1547 (emphasis added).

In the instant case, on the other hand, it bears repeating that resolution of the Berry grievance was not the result of negotiations or discussions between the parties. What occurred here was nothing more than a decision by the International not to pursue the grievance to arbitration. In my view, deferral in such circumstances is not appropriate.

When labor and management negotiate a grievance settlement, the merits of their respective positions will likely have a major bearing on the outcome. However, when a union merely decides not to appeal a grievance to arbitration, the union's view of the merits may have little to do with its decision. For example, in

Spann Building Maintenance Co.,[4] the union had a general policy of not arbitrating a discharge grievance if the company had offered reinstatement. In the instant case, the International's policy was not to appeal a grievance to arbitration if the GPC could agree on a solution. In another case, a union may not be able to afford the cost of arbitration. The Board should not dismiss an employee's statutory claim in deference to a private dispute resolution mechanism where there is a substantial likelihood that the party representing the employee's interests declines to proceed with the employee's claim on a basis that gives little or no consideration to the merits.

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[4]275 NLRB 971 (1985), remanded sub nom. Lewis v. NLRB, 800 F.2d 818 (8th Cir. 1986), supplemental decision 284 NLRB 470 (1987), second supplemental decision 289 NLRB No. 118 (July 15, 1988).

My colleagues do not cite a single case in which the Board considered a decision not to seek arbitration to be a "settlement," and I know of none. To the contrary, in Spann Building Maintenance, supra, the Board found that a union's decision not to pursue a grievance was not equivalent to a settlement. Briefly, the facts in that case were that the union filed a grievance over an employee's discharge and discussed resolution of the grievance with the company without success. After the employee filed an unfair labor practice charge, the company contacted the employee directly and offered reinstatement to a different work location with no mention of the offer being in settlement of the grievance. The employee accepted this offer. Thereafter, the union refused to pursue the employee's

grievance to arbitration on the ground that it "consider[ed] the matter as settled based on the fact that [the employee] was reinstated to employment." 289 NLRB No. 118, slip op. 2--3. Based on the union's position and citing Alpha Beta, the company urged the Board to defer to "the settlement agreement" between the company and the union. The Board found deferral inappropriate, distinguishing Alpha Beta on the ground that in Spann there had been no settlement of the grievance.[5]

Here, as in Spann, the parties did not negotiate a mutually satisfactory resolution of the grievance. And here, as in Spann, the decision not to appeal the

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[5]Combustion Engineering, 272 NLRB 215 (1984), is distinguishable on the same basis. In that case the Board deferred to a negotiated settlement in which both the employer and employee made concessions.

grievance to arbitration does not constitute a "settlement." In fact, this case is even weaker than Spann for finding a settlement because no party before the Board even argues as its primary position that the Berry grievance was settled.[6]

In Alpha Beta, the Board reiterated what it had stated earlier in Olin: this Agency is committed to a policy of deferral "where appropriate safeguards for statutory rights are satisfied." 273 NLRB 1547. One of those safeguards, implicit in Alpha Beta, is that the employee's bargaining representative negotiate the

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[6]The judge found that there had been a grievance "settlement," and the Respondent excepted to that finding. The Respondent's position is summarized in fn. 3, supra. The General Counsel's view is that the grievance was "dropped." The Charging Party argues that "[n]either Local 520 nor Mr. Berry was even involved in the settlement process, if that is a proper description for what went on before the GPC."

settlement to which the Board is deferring. Believing as I do in the importance of that safeguard, I must dissent from my colleagues' decision to defer to a nonexistent "settlement." I would instead affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Berry because of his activities as a union steward.

Dated, Washington, D.C. January 28, 1991.

/s/
Mary Miller Cracraft,
Member

NATIONAL LABOR RELATIONS BOARD

EDITOR'S NOTE

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 10, 1991 Decided February 11, 1992

No. 91-1098

PLUMBERS AND PIPEFITTERS LOCAL UNION NO. 520,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

UE&C-CATALYTIC, INC.,
INTERVENOR

Petition for Review of an Order of the
National Labor Relations Board

James L. Cowden, with whom *P. David Lopez* was on the brief, for petitioner. *David R. Straus* also entered an appearance for petitioner.

William M. Bernstein, Attorney, National Labor Relations Board, with whom *Jerry M. Hunter,* General Counsel, *D. Randall Frye,* Acting Deputy General Counsel and

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Aileen A. Armstrong, Deputy Associate General Counsel, were on the brief, for respondent. *Charles P. Donnelly,* Attorney, National Labor Relations Board, also entered an appearance for respondent.

Francis M. Milone and *Valerie I. Harrison* were on the brief, for intervenor. *Stanley F. Lechner* also entered an appearance for intervenor.

Before: MIKVA, *Chief Judge*, EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: The simple question in this case is whether the National Labor Relations Board ("NLRB" or "Board") may give deference to a pre-arbitration settlement reached by an employer and a union disposing of an employee's contract grievance with respect to a matter covered by the parties' collective bargaining agreement. The simple answer is yes.

In this case, the applicable collective bargaining agreement between UE&C-Catalytic, Inc. ("Catalytic") and fourteen International building trades unions — the General Presidents' Project Maintenance Agreement ("GPPMA") — prohibits work stoppages and provides that an employer may discharge or discipline employees for "proper cause." In 1985, Catalytic fired Garland Berry, a union steward with the petitioner, Plumbers and Pipefitters Local Union No. 520 ("Local 520"), for insubordination in connection with a threatened work stoppage. In protest against Berry's dismissal, Local 520 filed a grievance under the collective bargaining agreement and an unfair labor practice ("ulp") charge with the NLRB; the factual circumstances underlying the grievance and the ulp were exactly the same. The contract grievance dispute was thereafter settled in lieu of arbitration, with an agreement between representatives from Catalytic and the International Union providing for Berry's reinstatement without backpay. Subsequently, during proceedings at the NLRB, an Administrative Law Judge ("ALJ")

refused to grant deference to the settlement agreement and found for Berry on the merits, ordering his reinstatement *with* backpay. The Board reversed the ALJ and held that deference was appropriate. *Catalytic, Inc.*, 301 N.L.R.B. No. 44 (Jan. 28, 1991), *reprinted in* Deferred Appendix ("App.") 11.

We uphold the Board's decision and deny the petition for review. We find that the Board's policy of granting deference to pre-arbitration settlement agreements is consistent with the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (1988), and that the Board did not abuse its discretion by applying the policy in this case. In denying the petition for review in this case, however, we do not mean to suggest that the Board's opinion is without flaws. Indeed, as indicated during the oral argument before this panel, the Board's present policy on "deference"[1] is vacuous in significant respects, because it lacks any coherent theoretical basis. Although remand is unneces-

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[1]The Board historically has followed two separate policies of adjudicatory restraint, both of which have been referred to as "deferral" policies: one is the so-called "post-arbitral deferral" or "*Spielburg*" policy, pursuant to which the Board *grants deference* to arbitration decisions rendered through the grievance processes of collective bargaining agreements if certain conditions are met, *see Spielburg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); the other is the "pre-arbitral deferral" or "*Collyer*" policy, under which the Board *defers* (delays) consideration of unfair labor practice charges in certain circumstances until remedies under the applicable collective bargaining agreement have been exhausted by the complaining party, *see Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). *See also Hammontree v. NLRB*, 925 F.2d 1486, 1490-91 (D.C. Cir. 1991) (en banc) (describing Board's "deferral" policies); part I.C., *infra* (describing *Spielburg* policy). The Board policy at issue in this case — the granting of deference to pre-arbitration grievance settlements — is an outgrowth of the older *Spielburg* policy.

In *Hammontree*, we distinguished between the Board's "deferral" policies by referring to the *Spielburg* doctrine as a "*deference policy*" and to the *Collyer* doctrine as a "*deferment policy*." *See* 925 F.2d at 1490-91. For purposes of clarity, we will follow *Hammontree*'s terminology in this opinion. Thus, we will refer to the policy at issue in this case as a policy of *deference*.

sary in this case because deference to the settlement agreement was clearly permissible on the record before us, the Board will be well-advised to reconsider the basis for its deference policy in order to avoid the need for remand in future cases.

I. Background

A. *The Underlying Incident*

Catalytic is an engineering contractor which performs various maintenance services for industrial plants and utilities. Catalytic's craft employees are covered by a collective bargaining agreement known as the General Presidents' Project Maintenance Agreement.[2] The GPPMA is negotiated on a nationwide basis; its signatories are fourteen International building trade unions and several engineering contractors, including Catalytic. With the exception of wage rates, certain benefit packages and hiring hall practices (all of which are negotiated by the Local unions), the national agreement covers most conditions of employment for craft employees in the designated bargaining units. The Local unions are not signatories to the GPPMA; however, each Local is affiliated with one of the signatory International unions. Thus, although the Locals monitor compliance with the terms of the GPPMA, the affiliated International is the recognized bargaining representative for the employees in the designated local bargaining units. In this case, Local 520 is affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("United Association"), which is a signatory to the GPPMA.

The GPPMA contains a no-strike provision which prohibits work stoppages and slowdowns by the unions and

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[2]The GPPMA is designed to take account of the unique circumstances facing contractors like Catalytic, which operate a number of temporary projects at various work sites. *See Catalytic, Inc.*, 212 N.L.R.B. 471, 471-72 (1974) (describing history and function of GPPMA).

employees covered by the agreement. *See* GPPMA at 21-22, *reprinted in* App. 42. The Agreement also contains a management rights clause which provides, *inter alia,* that an employer may discharge or discipline employees "for proper cause." *Id.* at 5.

The events giving rise to the dispute in this case occurred at the Peach Bottom nuclear power plant in Delta, Pennsylvania, a facility owned by one of Catalytic's clients, the Philadelphia Electric Company ("PECO"). In the late summer of 1985, PECO decided to remove and repair the "snubbers" (large shock absorbers) at the Peach Bottom facility; Catalytic was awarded a contract to remove the snubbers, but the associated repair work was given to another contractor because of PECO's dissatisfaction with certain work previously done by Catalytic's pipefitters. Local 520 objected to this division of labor because it believed that the repair job should have been assigned to its pipefitters.

Catalytic decided that the most efficient way to remove the snubbers was to "split the shifts" of the eight pipefitters who were assigned to the job, with four working the usual day shift and the other four working the second shift. On Thursday, August 29, 1985, the foreman of the crew informed Garland Berry, the union steward, about the shift assignment, and told him that the work hours would go into effect on Tuesday of the following week. Berry relayed this information to August Hartinger, the Business Manager of Local 520. Citing safety concerns (but apparently motivated by his displeasure over the jurisdictional dispute), Hartinger advised Berry to tell the affected workers that the union would not go along with the splitting of the shifts. On Friday, August 30, Berry told the eight workers that they should continue to report for the day shift as usual. One of the workmen asked Berry if he should ignore the foreman's instructions regarding working hours, to which Berry responded that the union's instructions should be obeyed. *See Catalytic, Inc.,* slip op. at 3.

When Catalytic's Labor Relations Manager, Neal Greeley, learned of Berry's actions, he contacted Frank DeLuca, the Pennsylvania representative of the United Association. The matter was resolved when DeLuca agreed that the union would man the shifts according to management's wishes in exchange for Greeley's promise to hold a meeting to discuss the jurisdictional dispute over the snubber work. The affected employees then reported to work as directed on Tuesday, September 3, and no work stoppage occurred.

On September 12, 1985, a meeting was held to discuss the work assignment dispute at PECO. The meeting focused more on Berry than on the snubber controversy, however. Greeley, representing Catalytic, stated that Berry would be terminated because management believed that, some days prior, he had threatened a welding inspector. The union disputed this allegation, which was disproved to Catalytic's satisfaction later the same day. Nonetheless, employer representatives continued to express their dissatisfaction with Berry, saying "he was too much of a trouble maker." Transcript of ALJ Hearing ("Tr.") at 25 (testimony of Mr. Hartinger). Berry's status was not resolved at the meeting. The next day, though, Catalytic's Site Manager, Lou McCauley, informed Berry that he was being terminated for gross insubordination, based upon his instruction to the snubber workers to ignore management's directions as to the shift split.

B. *The Grievance Procedure*

Subsequent to Berry's discharge, Local 520 filed a grievance, claiming that the employer had acted without cause; the Local also filed an unfair labor practice charge against Catalytic, alleging that Berry had been terminated for engaging in protected union activity, in violation of sections 8(a)(1) and 8(a)(3) of the NLRA.[3] The NLRB did not

[3]Section 8(a) of the NLRA provides, in relevant part:

(a) It shall be an unfair labor practice for an employer—

act on the unfair labor practice charge until January 30, 1987, at which time the General Counsel issued a complaint; however, the grievance proceeded more promptly through the GPPMA grievance procedure.

The GPPMA establishes a four-step grievance and arbitration procedure for disputes arising under the contract. *See* GPPMA at 9-10. Step One of the process consists of a meeting between the aggrieved employee and/or a representative from the Local union and the employee's immediate supervisor. If the grievance is not resolved it proceeds to Step Two, at which a representative of the Local and a representative of the affiliated International Union consult with the employer's labor relations manager. If Step Two is unsuccessful, the grievance is referred in Step Three to the General Presidents' Committee ("GPC"), which includes a representative of each of the International Unions that are signatories to the GPPMA (there are no employer representatives). At Step Three of the process, representatives from the employer and the International Union responsible for the grievance are permitted to make oral and written presentations to the GPC. If the GPC and the employer are unable to reach agreement as to the appropriate disposition of the grievance within ten days after the hearing, either the employer or the International may invoke Step Four of the process, binding arbitration. *See id.*

The grievance procedure in this case began in late September 1985. The Step One meeting apparently produced

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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the NLRA];
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a) (1988).

no results. In October 1985, Hartinger, DeLuca and Berry traveled to the headquarters of the United Association in Washington, D.C., where they met with officials of the United Association in preparation for Step Two of the grievance process. Hartinger explained the facts, and Ed Moore, a United Association officer, called Catalytic's Vice President, David McIntire, in an unsuccessful attempt to resolve the grievance.

The following week, the Step Two meeting was held in Washington. DeLuca and two other United Association officials were present at the meeting; Greeley and McIntire represented the company. The parties discussed Berry's dismissal and the related snubber controversy in detail, including the union's position that Berry was following union orders when he countermanded management's directive regarding the split shifts. *See Catalytic, Inc.*, slip op. at 5. The grievance was not resolved at that meeting.

On January 2, 1986, the United Association initiated Step Three of the grievance process by referring the matter to the GPC to be considered during its mid-January 1986 meeting. At the GPC meeting, Greeley presented Catalytic's case and submitted a written statement. The United Association's case was presented by a Mr. Coyne, who had been briefed on the Berry matter by DeLuca and apparently had received records of the two prior Washington meetings. Coyne made an oral presentation to the GPC and also submitted a written statement of the union's position. Tr. at 189.

On January 31, 1986, the GPC informed the parties of its decision:

> At the last regular meeting of the General Presidents' Committee, a Step III grievance was reviewed involving Garland Berry, [a] member of UA Local #520 [who was] terminated from the Peach Bottom Nuclear Power Plant, Delta, Pennsylvania project.
>
> After hearing statements from both parties and carefully examining all of the evidence submitted, it

> was the position of the Committee that Garland Berry should be made eligible for immediate rehire without any back pay.

Letter from Thomas Owens, Administrator of the GPC, to David McIntire, Catalytic, Inc. at 1 (Jan. 31, 1986), *reprinted in* App. 87. Both Catalytic and the United Association accepted this determination; as a result, the GPC's resolution of the grievance became final under the contract. *See* GPPMA at 10 (arbitration available "[i]n the event agreement is not reached" at GPC stage). When Hartinger learned of the outcome, he objected on Berry's behalf, but the United Association informed him that "[b]ecause of the agreement of the General Presidents' Committee, there is no further step as far as arbitration. The only time it goes to arbitration is when the committee cannot agree to a solution." Letter from Ed Moore, Assistant General President, United Association, to August Hartinger, Business Manager, Local 520 at 1 (Mar. 6, 1986), *reprinted in* App. 79.

C. *The Board's Decision*

On April 20, 1987, more than a year after the GPC decision, an ALJ hearing was commenced on Local 520's unfair labor practice charge. In his decision, the ALJ declined to give deference to the result of the grievance procedure on the ground that Berry and Local 520 objected to the GPC's resolution of the grievance. *See* ALJ Decision at 8-10, *reprinted in* App. 29. On the merits, the ALJ found that Berry had been discharged because of his union activity and that the gross insubordination charge was a pretext. *See id.* at 7-8. Based upon these conclusions, the ALJ ordered Berry reinstated with backpay.

The Board reversed the ALJ on the deference issue and dismissed the complaint. The Board reasoned that, under its decision in *Alpha Beta Co.*, 273 N.L.R.B. 1546 (1985) ("*Alpha Beta*"), *petition for review denied sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), deference to the pre-arbitration settlement of the Berry grievance was appropriate. *See Catalytic, Inc.*, slip op. at 7-8, 11-12.

The Board's policy of granting deference to pre-arbitration grievance settlements is a relatively recent outgrowth of its longstanding *Spielburg* doctrine, pursuant to which deference is given to grievance arbitration awards in certain circumstances. *See Spielburg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Under the *Spielburg* doctrine, as revised in *Olin Corp.*, 268 N.L.R.B. 573 (1984), the Board grants deference to an arbitration award where: (1) the arbitration proceedings appear to have been fair and regular; (2) all parties agreed to be bound; (3) the arbitrator's decision is not "clearly repugnant" to the purposes and policies of the NLRA; and (4) the arbitrator considered the unfair labor practice issue. *See id.* at 573-74; *Spielburg Mfg. Co.*, 112 N.L.R.B. at 1082. An arbitrator's decision is not "clearly repugnant" to the NLRA unless it is "palpably wrong" — that is, "not susceptible to an interpretation consistent with the Act" — and the burden is on the opponent of deference to show that the conditions for granting deference have not been met. *Olin Corp.*, 268 N.L.R.B. at 574, 577.

The Board expanded its *Spielburg/Olin* policy by applying it to pre-arbitration grievance settlements in *Alpha Beta*. There, a union filed a grievance and an unfair labor practice charge when twenty employees were dismissed during a sympathy strike. After the contractually-established grievance committee deadlocked, the union, with the consent of the affected employees, agreed to a settlement whereby the employees were reinstated without backpay. The NLRB gave deference to the settlement, holding that the "principles [of *Spielburg/Olin*] apply equally to settlements arising from the parties' contractual grievance/arbitration procedures." 273 N.L.R.B. at 1547. The Board ruled that it would evaluate grievance settlements under the four *Spielburg/Olin* criteria, except that the "clearly repugnant" criterion would be modified to reflect the differences between an arbitration award and a grievance settlement. A settlement will not be deemed "palpably wrong" under the Act, the Board ruled, so long as it is arrived at through a process in which both sides make concessions. *See id.*

The Board's policy with respect to grievance settlements was further refined in *United States Postal Service*, 300 N.L.R.B. No. 23 (Sept. 28, 1990) ("*Postal Service*"). There, the Board granted deference to a grievance settlement entered into by the union and the employer over the grievant's objection. The Board ruled that a union may bind a unit employee to a settlement and waive his contractual and statutory rights, even absent his consent. *See id.*, slip op. at 5-6. The Board also clarified the application of the fourth deference criterion (consideration of the unfair labor practice charge) in settlement cases: "This criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice [claim]." *Id.* at 7.

In this case, the Board grounded its decision to grant deference on *Alpha Beta* and *Postal Service*. The Board began its analysis by finding, correctly in our view, that Catalytic's and the United Association's acquiescence in the GPC's resolution of the Berry grievance was "tantamount to a settlement agreement such as was involved in *Postal Service*." *Catalytic, Inc.*, slip op. at 9. The Board went on to conclude that the four *Alpha Beta/Postal Service* deference criteria were met in this case. *Id.* at 10-12. Rejecting the General Counsel's argument that it was inappropriate to give deference to a settlement to which Berry and Local 520 objected, the Board dismissed the complaint. *Id.* at 12. Local 520 now petitions for review of the Board's decision and order.

II. Discussion

The scope of our review of the Board's decision and order in this case is relatively narrow. The Board's formulation of its deference policy must be upheld so long as it is rational and consistent with the NLRA. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987);[4] *Hammontree v. NLRB*, 925

[4]In *United Food & Commercial Workers Union, Local 23*, the Court held:

F.2d 1486, 1491 (D.C. Cir. 1991) (en banc). The Board's decision to grant deference in a particular case may be reversed only for an abuse of discretion. *Bakery, Confectionery & Tobacco Workers Int'l Union 25 v. NLRB*, 730 F.2d 812, 813 (D.C. Cir. 1984). We find that the Board's deference policy constitutes a permissible interpretation of the NLRA and that the Board did not abuse its discretion by applying the policy in this case; accordingly, we deny the petition for review.

A. *The Board's* Alpha Beta *Deference Policy*

The first issue that we must address is whether the Board's policy of granting deference to pre-arbitration grievance settlements constitutes a permissible construction of the NLRA. Local 520 does not strenuously contest the propriety of the policy, reserving its fire for the contention that the Board abused its discretion in applying the policy on the facts of this case. Nonetheless, we must address the policy's facial validity as a threshold matter because, if the policy is invalid, the Board necessarily abused its discretion in giving deference to the pre-arbitration settlement of the Berry grievance.

We begin our analysis by clarifying what is not in dispute in this case. First, Local 520 does not challenge the legitimacy of the GPPMA's grievance procedure or its applicability in this case. Local 520 concedes that the mat-

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> On a pure question of statutory construction, our first job is to try to determine congressional intent, using traditional tools of statutory construction. If we can do so, then that interpretation must be given effect .... However, where the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.

484 U.S. at 123 (internal quotation marks and citations omitted).

ter at issue here — Catalytic's termination of Berry — is covered by the "proper cause" provision of Article II of the GPPMA and is subject to the GPPMA's grievance procedure. Indeed, it was Local 520 that invoked the grievance procedure on Berry's behalf. Thus, there is no dispute as to the fact that submission of the Berry matter to the GPC was entirely appropriate.

Local 520 also concedes, as it must, that the statutory right asserted by Berry in this case is within the category of rights that are subject to waiver by a union through the collective bargaining process. In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), the Supreme Court made clear that many of the rights guaranteed to employees by the NLRA may be altered or waived by a union in collective bargaining, so long as the union fulfills its duty of fair representation and takes no action that would impair the employees' choice of their bargaining representative. *See id.* at 705-07; *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983) ("*American Freight*") ("It is well settled that a union may lawfully waive statutory rights of represented employees in a collective bargaining agreement.").[5] Among the rights that may be modified or waived is the right to strike. *Metropolitan Edison Co.*, 460 U.S. at 705. A union thus may agree that, with respect to unit employees, the right to engage in a work stoppage is waived and that union officials may not encourage unit employees to take job actions in derogation of the no-strike clause. *See id.* at 705-06. Local 520 admits that in this case, as in

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[5]*See also* Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 27-32, 36-40 (1985).

Certain statutory rights may not be waived through collective bargaining. These include, *inter alia*, the free choice of a bargaining representative, the Act's prohibitions on "hot cargo" agreements and secondary boycotts, the statutory bar against "closed shops," and hiring hall practices that give preference to union members. *See id.* at 30-31; CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 865 (2d ed. 1983).

Metropolitan Edison Co., the statutory right at issue — Berry's purported privilege to counsel unit employees to engage in a work stoppage by ignoring Catalytic's instructions regarding the shift split — is a right which the United Association could waive, either through contract negotiations or the grievance/arbitration process.[6] Thus, Local 520 concedes that the statutory right allegedly infringed in this case is one with respect to which it was permissible for Catalytic and the United Association to bargain.

Finally, Local 520 raises no challenge to the legal regime established by *Alpha Beta*, 273 N.L.R.B. 1546, and *Postal Service*, 300 N.L.R.B. No. 23. Under those cases, the Board will give deference to a pre-arbitration grievance settlement when: (1) the settlement is reached through a collective bargaining process which is "fair and regular"; (2) the parties agreed to be bound by the terms of the settlement agreement; (3) the outcome reached is not "palpably wrong," meaning that both sides have compromised to some degree; and (4) the unfair labor practice issue was "considered" in the settlement process, in that the contractual and unfair labor practice issues are factually parallel and both parties were generally aware of the relevant facts. *Postal Service*, slip op. at 5-7; *Alpha Beta*, 273 N.L.R.B. at 1547-48. In accepting the validity of the *Alpha Beta/Postal Service* regime, Local 520 effectively concedes the validity of the Board's policy of giving deference to pre-arbitration grievance settlements where the four criteria set forth above are met.

The concessions made by Local 520 are hardly surprising, for a Board policy of granting deference to grievance settlements seems plainly consistent with the NLRA. We have long recognized that the Board "does not abdicate its

[6]Because "the grievance-arbitration procedure forms an integral part of the collective-bargaining process," *Metropolitan Edison Co.*, 460 U.S. at 708, a union's power to waive statutory rights during the grievance process is commensurate with its power to waive such rights during negotiation of a collective bargaining agreement.

responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques." *Associated Press v. NLRB*, 492 F.2d 662, 667 (D.C. Cir. 1974); *see also Local Union No. 2188, Int'l Bhd. of Elec. Workers v. NLRB*, 494 F.2d 1087, 1090 (D.C. Cir.) (same), *cert. denied*, 419 U.S. 835 (1974). On this basis, we have expressed approval of the Board's *Spielburg* deference policy in several cases. *See, e.g., Bakery, Confectionery & Tobacco Workers Int'l Union 25*, 730 F.2d at 814-15; *American Freight*, 722 F.2d at 832-33; *Bloom v. NLRB*, 603 F.2d 1015, 1019-20 (D.C. Cir. 1979); *Associated Press*, 492 F.2d at 666-67. Most recently, in *Hammontree v. NLRB*, 925 F.2d 1486 (D.C. Cir. 1991) (en banc), we upheld the Board's *Collyer* "deferment" policy,[7] pursuant to which the Board requires a complaining party, under specified circumstances, to exhaust available grievance procedures before pursuing an unfair labor practice charge. In *Hammontree*, the court held that the Board's policy furthered the NLRA's policy of encouraging private dispute resolution and did not otherwise contravene the federal labor laws. *See id.* at 1494, 1496.

Consistent with these cases, we can find nothing to indicate that the Board's policy of granting deference to pre-arbitration grievance settlements constitutes an impermissible interpretation of the NLRA where, as in this case, the statutory right implicated by the grievance is within the class of "waiveable" rights. *See Metropolitan Edison Co.*, 460 U.S. at 705-07 (discussing "waiveable" rights); *Energy Coop., Inc.*, 290 N.L.R.B. 635, 636 (1988) (same). Pre-arbitration grievance settlements, like the arbitration awards at issue in *Bloom* and *American Freight*, represent a consensual resolution of labor-management disputes through the collective bargaining process. By recognizing the validity and finality of settlements, the Board promotes the integrity of the collective bargaining process, thereby effectuating a primary goal of

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[7] *See Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *see also* note 1, *supra* (explaining *Collyer* policy).

the national labor policy. *See Metropolitan Edison Co.*, 460 U.S. at 704 (in enacting labor laws, Congress sought "to ensure the integrity of th[e] [collective bargaining] process"); *Hammontree*, 925 F.2d at 1502 (Edwards, J., concurring) ("[T]he NLRA and the LMRA [Labor Management Relations Act] are designed to protect both individual and collective rights, and have as their paramount goal the promotion of labor peace through the collective efforts of labor and management."). At least where a grievance implicates only "waiveable" rights, we find nothing in the NLRA that prevents the Board from showing deference to a pre-arbitration grievance settlement. Thus, we have no trouble in finding that a policy of deference is rational and consistent with the NLRA, and, therefore the Board is entitled to deference from this court with respect to the adoption of such a policy. *See United Food & Commercial Workers Union, Local 23*, 484 U.S. at 123.

B. *Application of the Deference Policy in this Case*

Having determined that the Board's *general policy* of granting deference to pre-arbitration settlements is permissible, we now turn to the question of whether the Board abused its discretion in applying the policy in the instant case. As discussed above, the Board gives deference to grievance settlements under *Alpha Beta* and *Postal Service* where the grievance procedure through which the settlement is reached is "fair and regular," all parties agree to be bound, the result reached is not "palpably wrong" under the NLRA and the unfair labor practice issue was "considered" by the parties, *i.e.*, the statutory and contractual issues are factually parallel and the parties were generally aware of the relevant facts. *Postal Service*, slip op. at 5-7; *Alpha Beta*, 273 N.L.R.B. at 1547-48. Local 520 argues that none of these four deference criteria is satisfied in the instant case. Contrary to Local 520's assertions, we find that the record contains substantial evidence to support the Board's conclusion that each criterion has been met.

First, Local 520 argues against deference on the ground that the GPC process was not "fair and regular" because,

among other things, Berry was not permitted to be present at the GPC meeting, the presentation made by Mr. Coyne on his behalf was inadequate and no written opinion was issued by the GPC. We reject Local 520's contentions. The record demonstrates that Berry's case was fully discussed by representatives of the United Association and Catalytic prior to the GPC meeting. It is true that Berry was not present at the GPC meeting; but this is hardly a fatal flaw in the process. The *parties* to the agreement — not individual employees in the unit — are the ones who must create and administer the grievance procedure under the collective bargaining contract. Thus, within the bounds of the duty of fair representation, individual employees in the bargaining unit are properly subject to the judgment of their union agents in the processing of grievance claims. This is neither surprising nor unfair, for the union is the signatory to the agreement and thus is responsible for enforcing it. In other words, the employer is bound to bargain only with the employees' agent, not with each and every employee in the unit.

Even if either the Board or this court had the authority to second-guess the union's processing of the grievance in this case, there is nothing suspect on this record. Mr. Coyne was briefed on Berry's case by Mr. DeLuca and apparently received summaries of the two prior meetings at the United Association headquarters in Washington (the initial interview with Berry and the "Step Two" meeting). There is no evidence that Coyne's presentation to the GPC was inadequate or that it somehow unfairly characterized Berry's claim. Nor is the lack of a written opinion by the GPC dispositive. *Cf. United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."); *Bloom,* 603 F.2d at 1020-21 (deference appropriate despite fact that arbitration panel's decision not set out in detailed written form). The crucial fact here is that the grievance procedure agreed to by the parties was lawful and was followed in this case; the Board was not required to decline to show deference

merely because the petitioner would have preferred a different grievance process.

Next, Local 520 argues that all parties did not agree to be bound by the settlement agreement because both it and Berry objected to the terms of the settlement.[8] This argument is unavailing. The United Association, and not Local 520, is Berry's recognized bargaining representative. Absent a breach of the duty of fair representation, the United Association was empowered to bind Berry to the result obtained through the grievance process. *See Metropolitan Edison Co.*, 460 U.S. at 705-07 (union may waive non-representational rights of unit employees); *Mahon*, 808 F.2d at 1345 (union empowered "to conclusively bind" unit employees to settlement limiting their backpay entitlement "[w]holly apart from their own separate consents"); *Energy Coop., Inc.*, 290 N.L.R.B. at 637 (same). No claim is made here that the United Association breached its duty of fair representation in handling Berry's grievance, *see* Tr. at 51-53 (testimony of Mr. Hartinger); thus, the Board did not err in finding that the *relevant parties*, the United Association and Catalytic, properly agreed to be bound by the terms of the grievance settlement.

Third, and most strenuously, Local 520 claims that the Board erred in granting deference because the result reached by the settlement — Berry's reinstatement with-

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[8]The record clearly shows that the United Association and Catalytic agreed to the terms of the settlement, and Local 520 does not seriously contend otherwise. The GPPMA itself contemplates that when the GPC reaches agreement as to how a grievance will be resolved, and the employer accepts that resolution, the grievance is "settled" and there is no recourse to arbitration. *See* GPPMA at 10 (arbitration available "[i]n the event agreement is not reached" by GPC and employer). Moreover, the United Association clearly viewed the grievance as settled — it responded to Hartinger's protest by stating that "[b]ecause of the agreement of the General Presidents' Committee, there is no further step as far as arbitration." Letter from Ed Moore, Assistant General President, United Association, to August Hartinger, Business Manager, Local 520 at 1 (Mar. 6, 1986), *reprinted in* App. 79.

out backpay — is repugnant to the NLRA. Local 520 argues that because Berry was discharged for engaging in allegedly protected activity, Board precedent requires that he be given "make whole" relief. Since Berry received less than full relief, Local 520 contends, the settlement agreement was "palpably wrong" under the NLRA and the Board should not have given deference.

We reject this contention on several grounds. First, Local 520's "palpably wrong" argument presumes that this case presents an unfair labor practice issue apart from the contractual issue of whether Catalytic had "proper cause" for discharging Berry. This view has been categorically rejected by this court in *American Freight,* 722 F.2d at 831-32, where we found that *there was no separate statutory issue.* In *American Freight,* we held that where a provision in a collective bargaining agreement relating to the refusal of work assignments differed from an analogous NLRA provision, the parties' agreement constituted a waiver of the employee's statutory right; to have held otherwise, we noted, would have been to embrace

> [t]he obvious fallacy ... that there is a statutory issue apart from the contractual issue. . . . In other words, assuming, *arguendo,* that an individual employee has a right under the NLRA to refuse to work [in circumstances different from those prescribed in the agreement] ..., that alleged right was waived by the collective bargaining agreement in this case.

Id. at 832; *see also* Edwards, *supra,* at 28 ("The parties' agreement, in essence, supplants the statute as the source of many employee rights in the context of collective bargaining."). In this case, then, the statutory right allegedly infringed — Berry's purported privilege to counsel unit employees to take action tantamount to a work stoppage — was merged into the "no-strike" and "proper cause" provisions of the GPPMA. As such, the result reached through the grievance procedure was, by defini-

tion, not "palpably wrong" under the NLRA because there was no separate statutory issue.

Furthermore, the Board granted deference to settlements providing less than make-whole relief in *Alpha Beta* and *Postal Service,* and Local 520 does not challenge the validity of those cases. *See Postal Service,* slip op. at 4, 7; *Alpha Beta,* 273 N.L.R.B. at 1546-47. Additionally, it is well-established that the NLRB's General Counsel may settle unfair labor practice charges prior to a hearing, even over the charging party's objection that the relief obtained is insufficient. *See, e.g., United Food & Commercial Workers Union, Local 23,* 484 U.S. at 118-21; *see also* 29 C.F.R. §§ 101.7, 101.9 (1991) (regulations governing settlements). We see no significant difference between that accepted practice and the consequence of the deference policy applied in this case.

Lastly, Local 520 contends that the fourth *Alpha Beta/Postal Service* criterion is not met in this case because the unfair labor practice issue was not "considered" by the parties in reaching the settlement agreement. The short answer to this contention is that, because the GPPMA provided rules for evaluating the propriety of Berry's termination (the "proper cause" provision), there was no surviving unfair labor practice issue. Whatever rights Berry may have had under the NLRA were waived by the United Association in the collective bargaining agreement — and again at the settlement table — such that there was no separate statutory issue for the parties or the GPC to "consider." *See American Freight,* 722 F.2d at 832-33.

In any event, using the Board's most recent test for the "considered" criterion, it is clear that the Board properly applied its deference policy in this case. In *Postal Service,* the NLRB held that the requirement that the parties to a settlement "consider" the unfair labor practice issue is satisfied where "the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the

unfair labor practice [issue]." *Id.*, slip op. at 7. In this case, the issue under both the GPPMA and the NLRA was whether Catalytic was justified in terminating Berry based upon his alleged insubordination. Berry's defense on his contract claim was the same as his position on the unfair labor practice issue — that he was just following the instructions of Hartinger, the union Business Manager. As such, the same operative facts underlay both issues and the "considered" leg of the deference inquiry is satisfied. *Cf. Bloom,* 603 F.2d at 1020-21 (contract and unfair labor practice issues factually parallel where both turned on whether employee's action was justified).

Local 520 argues, however, that even if the contractual and unfair labor practice issues were factually parallel, the "considered" criterion is not met because the United Association specifically disclaimed any intention of resolving the statutory issue. Local 520 points to Mr. DeLuca's testimony at the ALJ hearing that when Ed Moore of the United Association's central office learned that Local 520 had filed an unfair labor practice charge on Berry's behalf, he informed DeLuca that the matter was "out of their [the United Association's] hands now because the case had been filed before the . . . National Labor Relations Board." Tr. at 295. Local 520's contention is simply wrong as a factual matter. The transcript reveals that at the time when the United Association learned that the NLRB charge had been filed, the "Step Two" meeting recently had been held and the United Association was optimistic that the Berry matter might be resolved without recourse to Step Three of the GPPMA grievance process. Mr. DeLuca testified that upon learning that the NLRB had become involved, the United Association concluded that the matter was "out of their hands" — *i.e.,* that resolution at the more informal second step of the grievance process would not be possible — and that "it [the Berry grievance] would just have to go to step three." *Id.*; *see also* ALJ Decision at 4. Indeed, the United Association subsequently took the Berry grievance to Step Three and presented his case to the GPC. Thus, the record belies Local

520's claim that the United Association disclaimed responsibility for the unfair labor practice issue, or any other part of the Berry matter.

In sum, we find substantial evidence in the record to support the Board's conclusion that the four *Alpha Beta/Postal Service* deference criteria are satisfied in this case. The first two criteria clearly are met because the GPPMA grievance procedure was "fair and regular" and the *relevant* parties — the United Association and Catalytic — agreed to be bound by the terms of the settlement. To the extent that the third and fourth criteria are relevant, *see American Freight,* 722 F.2d at 832-33, the record supports the conclusion that they also are satisfied. We therefore conclude that the Board did not abuse its discretion by granting deference to the settlement agreement; accordingly, the petition for review must be denied.

C. *The Theoretical Underpinnings of the Board's Deference Policy*

Although we deny Local 520's petition for review, we are compelled to express concern over the Board's apparent lack of a coherent theory for its *Alpha Beta/Postal Service* deference policy. In *Darr v. NLRB,* 801 F.2d 1404 (D.C. Cir. 1986), we vacated an order in which the Board had given deference to an arbitration award that was seemingly inconsistent with Board precedent. *Id.* at 1407-09. We reached this result primarily because the Board had failed to provide a coherent theory supporting its decision to give deference. We noted that the Board's decision might have been justifiable under the contractual waiver doctrine approved by this court in *American Freight*; but because the Board had failed clearly to espouse that, or any other, theory of deference, we remanded the case for further consideration. *See Darr,* 801 F.2d at 1408-09. Although remand is not necessary in this case, the Board's decision — and the explanation of the decision provided by the Board's counsel at oral argument — provide us with little comfort that the doctrinal difficulties identified in *Darr* have been resolved.

Of special concern in this case is the so-called "palpably wrong" criterion for deference. In *Alpha Beta* and *Postal Service,* the Board stated that, in the settlement context, the "palpably wrong" criterion is satisfied so long as both parties to the settlement make concessions.[9] *See Postal Service,* slip op. at 7; *Alpha Beta,* 273 N.L.R.B. at 1547-48. At oral argument, counsel for the Board was unable to give a persuasive rationale for the "concessions" test.

The "concessions" test under the "palpably wrong" criterion makes no sense if the underlying theory of the Board's deference policy is the contractual waiver doctrine, as appears to be the case. *See Postal Service,* slip op. at 5-6 (appearing to apply waiver theory); *cf. Darr,* 801 F.2d at 1408 (noting that Board's *Spielburg* deference policy "seems to partake" of waiver theory). Under the contractual waiver doctrine, the Board could *never* give deference to a settlement with respect to a "non-waiveable" statutory right — such as the employees' choice of a bargaining representative, the NLRA's prohibitions against "closed shops" and secondary boycotts, and the like. Because a union and an employer may not legally bargain about non-waiveable matters, the Board could not, consistent with the NLRA, give deference to a settlement which implicated such rights.

On the other hand, where the statutory right implicated by a grievance settlement is within the category of "waiveable" rights — *e.g.,* economic issues, the right to strike, matters of selective discipline and the like — then it is unclear why the Board *would ever have any choice but to give deference,* at least so long as the grievance procedures through which the settlement is reached are fair and regular and the union has not breached its duty of

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[9]In finding the settlement agreement in *Alpha Beta* not to be "palpably wrong," the Board appears to have placed some weight on the fact that the settlement was negotiated "within the context of the agreed-upon grievance/arbitration procedures." *Alpha Beta,* 273 N.L.R.B. at 1547. Of course, to the extent that the use of the grievance process is a part of the "palpably wrong" test, that factor is merely redundant of the first deference criterion.

fair representation. In other words, since a union has broad discretion to alter or modify employees' "waiveable" rights through collective bargaining, *see Metropolitan Edison Co.*, 460 U.S. at 705-07, we see no basis upon which the Board legitimately could intervene merely because the settlement reached by the union and the employer was not to the Board's liking. As the courts have recognized in the refusal to bargain context, the Board has no generalized authority to command settlements or force parties to agree to contractual terms that meet with the Board's approval. *See H.K. Porter Co. v. NLRB,* 397 U.S. 99, 106 (1970) ("'[T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.'" (quoting *NLRB v. American Ins. Co.,* 343 U.S. 395, 404 (1952))); MORRIS, *supra,* at 705, 849 (same); *cf. Fournelle v. NLRB,* 670 F.2d 331, 341 (D.C. Cir. 1982) (holding that, in the context of selective discipline, "the Board should not attempt ... to meddle with the legitimate products of the collective bargaining process").

In short, we are at a loss to discern either the theoretical underpinnings of the "palpably wrong" criterion, or the standards that the Board purports to follow in applying it. Indeed, the current formulation of the criterion seems designed to permit the Board to give deference when it approves of the result of a settlement, but to intervene when it does not, with no apparent standards for judgment.[10] Such an approach gives the parties no clear

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[10]At oral argument, counsel for the Board explained the rationale of the "palpably wrong" criterion as follows:

> [T]he Board is in a situation in which it has statutorily the responsibility of preventing and prosecuting unfair labor practices; it also has, in the statute, ... a national policy favoring the private resolution of disputes [through] settlements.... I think there is some room for a case-by-case analysis.
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> The Board is, in a sense, in the middle here. It has a responsibility ... to protect employee rights by retaining jurisdic-

indication as to what kinds of settlements will be found to be "palpably wrong" in a given case. A cynical observor might be inclined to view this approach as a veritable recipe for arbitrary action.

In this case, we need go no further than to highlight the logical inconsistencies in the current formulation of the Board's deference policy. Local 520 does not contest the validity of the policy, and its application here was clearly permissible because, as Local 520 concedes, the statutory right at issue in Berry's case was within the category of "waiveable" rights. However, we urge the Board to give serious consideration to the logical flaws in its current policy and to attempt to develop a comprehensible theory of deference. As *Darr* indicates, our patience with the Board's failure to develop a coherent theory of deference is not limitless, and the Board's continued recalcitrance may well result in reversal in future cases less clear-cut than the one before us today.

III. Conclusion

For the reasons stated above, we deny Local 520's petition for review of the Board's decision and order. However, because the decision under review demonstrates the Board's continued failure to articulate a coherent theory

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> tion and withholding its processes and then applying its judgment to settlement agreements [and] to arbitration awards, and to set forth standards to review those. This satisfies both roles of the Board in order to foster the national policy favoring private dispute settlements as well as to fulfill its responsibility [to protect employees].

We see no way to interpret these rather opaque remarks except to conclude that the Board will intervene under the "palpably wrong" criterion when it dislikes a settlement but will stay its hand when the terms of the settlement meet with its approval. The problem is that there is no way to determine what — apart from the whim of the Board — will influence a judgment to approve or disapprove a settlement.

for its deference policy, we urge the Board to clarify its position in future cases.

So Ordered.

CERTIFICATE OF SERVICE

I, JAMES L. COWDEN, ESQUIRE, certify that I have served two (2) true and correct copies of the foregoing document on each of the following at the addresses stated by First Class United States mail, postage prepaid, addressed as follows:

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Dated: 8 May 1992